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A TREATISE

ON THE

PRINCIPLES AND PRACTICE

OF THE

ACTION OF EJECTMENT.

A TREATISE

ON THE

PRINCIPLES AND PRACTICE

OF THE

ACTION OF EJECTMENT,

AND

THE RESULTING ACTION FOR

MESNE PROFITS.

By JOHN ADAMS,

SERGEANT AT LAW, PAT: PRE: AND ASSISTANT JUDGE OF THE MIDDLESEX SESSION.

WITH COPIOUS NOTES AND REFERENCES

TO THE AMERICAN AND ENGLISH DECISIONS.

By Messrs. JOHN L. TILLINGHAST, THOMAS W. CLERKE and WILLIAM HOGAN.

WITH ADDITIONAL NOTES OF DECISIONS

IN THE COURTS OF THE SEVERAL UNITED STATES

TO THE PRESENT TIME.

By THOMAS W. WATERMAN,

COUNSELLOR AT LAW.

FOURTH EDITION.

NEW YORK:

BANKS, GOULD & CO., 144 NASSAU STREET.

ALBANY:

GOULD, BANKS & CO., 475 BROADWAY.

1854.

Entered according to the act of Congress in the year eighteen hundred and fifty-four, by
BANKS, GOULD & CO.,
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BANKS, GOULD & CO., Law Printers,
144 Nassau Street.

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PREFACE.

THE desire to acquire and to hold property is one of the strongest of the human feelings. It might, perhaps, be better called a passion: so deeply rooted is it, so ardent, and so engrossing. To gratify it, hardships are patiently endured, dangers cheerfully and heroically braved, and even life risked, and sometimes sacrificed. It is founded partly upon the necessity which renders some acquisitions indispensable; partly upon the love of the power and influence which possessions confer; and partly on the avarice which enjoys riches for their own sake.

This impulse is towards all material things: in short, towards everything that can become the subjects of ownership. But, the more fixed forms of property, as they are the least perishable, minister most permanently to the gratifications and the pride of man, and are susceptible of being transmitted to remote posterity, are the most highly esteemed and the most eagerly sought after by him. This, at all events, has always been the case in civilized life. The only exceptions to the rule are to be found among wandering and savage tribes, whose rude tastes and unsettled lives limit them to whatever is present and fleeting.

From the earliest ages, therefore, exclusive title in the soil has been among the primary objects of man's ambition. Nations, as well as individuals, have coveted and sought to obtain extensive landed possessions. Nearly all the wars with which the earth has been scourged, though ostensibly owing to other causes, were, in fact, originated by this desire for territorial acquisition. The conquests of Alexander the Great, ending in lamentation that there were no more worlds to conquer, might very well be taken for a splendid allegory, truly illustrating this morbid and insatiable longing of man. The Roman Empire grasped after territory until its very expansion brought weakness and decay. And in more modern times, down to the present day, nations, regardless of the solemn lessons of the past, have continually striven, and are continually striving, to enlarge their area.

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It is the same with individuals. Despotic rulers, whose will is law, have always held, to their private use, extensive domains; and so also have the kings and nobility of monarchial governments. Indeed, so desirable, and so essential to the dignity of their position, has permanent property in land been considered, that stringent laws have been passed, forbidding its alineation. In more favored conditions of society, where most persons have a competency, the ambition of men extends in the same direction. It may be well that it is so. Doubtless, the wish to possess a portion of the earth's surface is a more healthful and higher aspiration than the coveting any mere works of art. Certain it is, that those who have most to do with the soil, as independent owners of it, are generally most upright, magnanimous, generous, enterprising, and brave.

Such being the dignity and paramount importance of this species of property, the right to it ought to be definitely fixed and zealously guarded. And so it is. In no branch of the law are the rules more express, clear, and positive. In none are the principles of the common law better settled, the requirements of the statutes more explicit, or the decisions of the courts more uniform or better understood. But, independently of the main subject, there are others incidental and collateral thereto, involving many nice questions, the judicial construction of which has enriched thousands of volumes of reports, and given rise to numerous learned and useful treatises.

A good and indefeasable title to real estate is, of course, the foundation of all property in it. As the action of ejectment is an action to test this title, it is necessarily among the most important of our judicial proceedings. Probably, no action comprehends more of the wise regulations of laborious legislatures and of the learning of venerable courts. It is also a very ancient and a very curious remedy. It originally consisted entirely of fictions, and had in it much of the grotesque and even ludicrous. Although it has settled down into a connected, matter of fact, and convenient system, and has consequently lost much of its former character, yet, it still retains enough of quaintness, especially in those states which preserve the English practice, to render it highly attractive.

The work before us, by Mr. Adams, is a most learned and classical treatise on the history, principles, and practice of this ancient and venerable proceeding. The book opens with a history of the action.

The successive steps in the practice are then given in their natural order. The resulting action of mesne profits is next treated. And lastly are presented appropriate practical forms. We need not commend the work to the older members of the profession; for, with them, its character is already established. It has already passed into the fourth edition, and is very justly esteemed a standard authority. But, to those about entering upon the practice of the law, we would say: obtain Mr. Adams' book, without delay. It discusses all the law of the subject most thoroughly, in language of remarkable vigor and clearness. It is a safe counsellor and useful companion for the practitioner, and an unequalled text-book for students. We would add, that persons not belonging to the profession, especially brokers, and others dealing extensively in real estate, may consult its pages with advantage.

The last London edition of Adams, of which the present is a re-print, comes to us greatly improved. The arrangement, general outline, and all the more valuable portions of the original work, have been retained. Parts, however, of the older editions, in consequence of the modifications that have taken place in the law, having become obsolete, have very properly been expunged, while other matter has been added, in conformity with the existing practice. This celebrated treatise has, therefore, now received, as it were, the finishing touches of its author, and may be considered as complete.

This work first appeared in this country with notes, in 1830. It was edited by John L. Tillinghast, Esq., who brought to it great industry, habits of patient study, and a highly disciplined and cultivated mind. It came from his hands as complete an American, as it had been before an English book. He had added to it extensive notes of great learning and value; for, they comprised the English decisions not cited by the author, together with all of the American authorities. The whole had been laboriously and accurately digested, with an eye to direct practical utility. The talent of the editor, and the enterprize of the American publishers, met their appropriate reward. The work was at once received with high public favor, and obtained an enviable reputation, which it has sustained ever since.

The next succeeding editions were respectively edited by the Hon. Thomas W. Clerke, now one of the judges of the New York Supreme

Court, and William Hogan, Esq., an ex-judge of New York. Of the importance and value of their labor, it is not so easy to speak, since their ground had already been, to a great extent, pre-occupied. But, their services, in revising and (as was done by the last named gentleman) in re-arranging the notes, and in bringing them down to the period when their respective editions were published, must have been valuable, and have contributed in no small degree to its present completeness and popularity.

From the antecedents which the editor of the present edition of Adams has had, it is evident that much of the labor which would otherwise have devolved upon him, had already been done; and that he has, therefore, had but a subordinate duty to perform. What he has been required to do has been to preserve the paging of all former editions; to re-construct the index and table of cases; to carry the numerous authorities in the appendix into the body of the work; and, finally, to revise, with care, the notes, expunging such decisions as have been overruled, or which, from changes in the law, have become obsolete, and adding to them all the more recent authorities. He must confess, however, that this task, simple as it appears, has proved exceedingly responsible and toilsome.

THOMAS W. WATERMAN.

New York, No. 77 *Nassau street, Jan. 3rd,* 1854.

PREFACE

TO

MR. HOGAN'S EDITION.

The complete exhaustion of that edition of Adams' Treatise on the Action of Ejectment, which was prepared by Mr. Tillinghast, subsequently to the enactment of the Revised Statutes of New York, and was happily adapted, by the well directed intelligence and sedulous industry of that gentleman, to the great modification of our law on that subject, which had then taken place; and, also, of that later edition of the same work, afterwards put forth by Mr. Clerke, with annotations and references to those more recent decisions which, up to that time, had marked the progress made in the application to the Action of Ejectment of the principles developed in the provisions of the Revised Statutes, and in the prescription of regulations correspondent therewith are facts, which bear the most unequivocal testimony, not merely to the high estimation accorded to the original text of the learned author, but, also, to the valuable and acceptable services rendered by the American editors, already named, to the legal profession throughout the United States. Under these circumstances, and after careful examination of the last edition referred to, it has been considered simply an act of justice to Mr. Tillinghast and Mr. Clerke, again to present to the profession and the public the results of their useful labors, and, substantially, in the form and manner adopted by them-

selves: and to annex thereto a synopsis of the law affecting the recovery of the possession, and vindicating the title to real property, which now obtains in the several States of the Union, so far as it has been more recently enunciated by the decisions of the respective courts of Appellate Jurisdiction.

The text is a careful re-print from the latest London edition, corrected by the author himself; the paging, and the index to the text correspond therewith; so, also, does the index to the American notes, so far as the same are placed in juxtaposition with the original text; while the index to such annotations and decisions as are embraced in the appendix, refers to the paging of this edition.

The additional notes introduced in this volume are presented under an arrangement differing from that heretofore adopted. In such notes, the decisions of the courts of each state, on the incidents to the action, are given separately, with so much of classification, when it could well be resorted to, as should place together the decisions on particular points. This arrangement has been adopted, not without hesitation, because, it varied from that heretofore followed in earlier editions, which have generally placed the decisions of the courts of all the states on each particular incident together. But, inasmuch as the action, as it exists in England, has been essentially modified in its adaptation and application on this side of the Ocean, not only by circumstances connected with the political and social organization of the United States —but also by statutory enactments of many of the states, greatly differing from each other in their provisions, and, of necessity, producing correspondent differences between the decisions of the courts of such states, it must often have occurred, that the array in juxtaposition, of decisions on the same point, apparently so widely variant from each other, has conveyed to the mind of the student a very embarrassing notion of the existence of a complicated *conflictus legum;* and of such difficulties in the practical application of the principles of the text to the differing laws of so many sovereign states, as to make the value of such text a matter of grave question.

In illustration of this idea, the doctrine of *Adverse Possession* presents itself; this main defence to the action of ejectment is modified in different states, by differing regulations as to Limitations; Champerty; Improvements; for Quieting Title, and otherwise; now, by placing in juxtaposition with the text, and with each other, some two or three hundred decisions of the courts of twenty-six states, the laws of many of which differ on this subject, without giving an explanation of the modifications which have produced such differences of judgment, the student must often think that he is groping his way through a maze of contrarieties; but, if the leading features of the statutory modifications, which the original action has undergone in each state, be given separately; and be elucidated by the decisions of the courts of each state, all brought together under appropriate heads, as appendices to the text; then, the text and the appendices will reflect a clear and steady light, each on the other; then, the practitioner will turn with ease from the text, expounding the general principles of the action, to the proper appendix, exhibiting the modifying enactments and decisions of that state, in the courts of which he is about to apply those principles, and will pursue his aim unfalteringly to the goal: then, the general student will compare the text with the law, as modified, in each state, in succession; and such systems of modified laws with each other; and will find his depressing misgivings of a distracting *conflictus legum* happily dispersed; will perceive what admirable harmony and accordance pervades that body of statutory enactments, and of judicial decisions, which, resting on the deep laid foundations of common sense, and common justice, afford secure guaranties for the protection of the rights of property, and of person, to the humblest, as to the highest of his fellows; and will ponder his studies with a loftier and juster perception of the intellectual dignity, and essential utility of the profession to which he has devoted himself.

In preparing this work for the press, upwards of three hundred volumes, (being all the law reports of all the states, down to this time, which had not been previously consulted,) have been carefully exam-

ined; and, (studiously omitting all matters which did not appear to be of general or particular interest, either as involving some novelty of application of an established principle; or presenting some peculiarity of circumstance; or settling some doubtful question; or suggesting some interesting analogy;) such selections have been made from the decisions reported, as justify the confident belief that the law relating to the Action of Ejectment, as it now exists throughout the United States, is fully and correctly presented to the profession in the following pages.

WILLIAM HOGAN.

New York, 1845.

PREFACE

TO

MR. CLERKE'S EDITION.

All the American decisions omitted in Mr. Tillinghast's Edition, and those which have been reported since its publication, have been diligently digested, and are inserted in the Present Edition. Many of them will be found essentially important, and all interesting; as showing the various modifications which the action of ejectment has been obliged to assume, in order to accommodate itself to the legal and social diversities of numerous though kindred communities; each probably presenting some peculiar characteristics in its foundation and structure.

The decisions in our own State since the publication of Mr. Tillinghast's Edition, are exceedingly interesting to the profession. Most of them relate to cases, brought in conformity with the Revised Statutes, containing principles and prescribing regulations corresponding to the new provisions of these Statutes; an intimate acquaintance with which is indispensably requisite for every practitioner in the State of New York; and cannot be overlooked by those of any portion of the Union; as it is not to be expected that any of our sister States will continue to retain the useless and cumbersome machinery of the old practice.

The present is a re-print from the latest English Edition, and contains improvements, both in matter and arrangement, made under the diligent revision and matured experience of the author.

In England, the action of ejectment has undergone radical and extensive modifications since the publication of the former edition; which have rendered it necessary to make substantial corresponding modifications in the plan of the work. It may then be safely presented to the profession in its present shape, as the most useful treatise ever issued from the American Press on the subject to which it relates.

T. W. C.

New York, Dec. 1839.

PREFACE

TO

MR. TILLINGHAST'S EDITION.

Mr. Adams' valuable Treatise on the Action of Ejectment being nearly out of print, and the *Revised Statutes* of *New York* having made numerous and important changes in the form and effect of that Action, it was believed that a new Edition of Mr. Adams' Work, with Notes adapted to the *Revised Statutes*, and with References to the Decisions of the American Courts on the subject of Ejectment, and to those made in the English Courts since the publication of the last Edition of Mr. Adams' Treatise, would prove useful. Under that belief, the present Edition has been prepared and published.

The Text of this Edition has been carefully re-printed from the Text of a former Edition of Mr. Adams' Work, published in this country several years since, with notes and references to some of the American Reports, by Philo Ruggles, Esq. With the paging of that Edition, the paging of the present has been made to correspond, in order to preserve uniformity in references; but no further or other use has been made of it, than is here mentioned.

It will be seen, upon examination, that *all* Mr. Adams' Treatise, including his Appendix, Index, Table of Cases, &c., is re-published in

this Edition, *entire*. The additions now made, consist of Notes of American Decisions, extracted from the Reports of Cases in the Courts of the United States, and in those of all the States in which Reports have been published; Notes of Decisions made in the English Courts, since the publication of Mr. Adams' third Edition, and some few of previous dates which had not been referred to in the Text; a Summary of the provisions of the Statutes of Limitations of the several States, so far as they relate to Rights of Entry, and to Actions for the recovery of Land; the Statutory Provisions of the State of New York, in relation to Actions of Ejectment; A collection of Forms in Ejectment, adapted to the *Revised Statutes* of *New York*, the most of which have been sanctioned by the Supreme Court, and inserted, as Precedents, in the Appendix to their Rules; A Digest of Judicial Decisions in relation to the Doctrine of "*Adverse Possession*;" Tables of English and American Cases cited, and Tables of English and American Reports examined in preparing this Edition; A Table of Abbreviations; and an Index of the additional matters contained in the present Work.

With a hope that it may serve to economize the time and labor of whomsoever may consult it, this volume is now presented to the Public.

Albany, November, 1830.

PREFACE

TO THE

FOURTH ENGLISH EDITION.

Upwards of thirty years have elapsed since the Author first offered this Treatise to the Profession—an eventful period in the history of English Law. And it is a remarkable fact, that whilst the entire practical machinery in every other action has been reconstructed, and the rules for pleading remodelled, the proceedings in the action of Ejectment have remained unaltered; a circumstance probably to be attributed to the anomalous nature of the action, which gives to the Courts at all times an uncontrolled power of regulating its proceedings and supplying its deficiencies.

Two important statutes connected with the subject of this Treatise, namely, stat. 3 & 4 Wm. 4, c. 27, "for the Limitation of Actions and Suits relating to Real Property," and stat. 3 & 4 Wm. 4, c. 74, "for the Abolition of Fines and Recoveries," have however received the sanction of Parliament since the publication of the third edition: the first part of the chapter which treats of the Title Necessary to Support the Action has, in consequence, been re-written, and the chapter relating to Actual Entry omitted.

Material alterations have also been made in that part of the chapter upon Evidence, which relates to the proof of the due execution of

Wills; so as to adapt it to the provisions of the stat. 7 Wm. 4, and 1 Vict. c. 26, sec. 10; and the chapter upon the stat. 1 Geo. 4, c. 87, and stat. 1 Wm. 4, c. 70, for Regulating the Action of Ejectment as between Landlord and Tenant, which were scarcely in operation at the time of the publication of the last edition, has been much enlarged. The practical part of the Work has also been completely revised, and an attempt has been made to classify and reduce to order the numerous and sometimes apparently inconsistent decisions, relating to an important branch of the practical proceedings, namely, the Service of the Declaration, and the Rule for Judgment against the Casual Ejector.

1 Serjeants' Inn, Chancery Lane,
June 1, 1846.

PREFACE

TO THE

FIRST ENGLISH EDITION.

It has been the Author's chief endeavor, in the following pages, to investigate the principles upon which the remedy by ejectment is founded; to point out concisely the different changes which the action has undergone; and to give a full and useful detail of the practical proceedings by which it is at this time conducted. To this end the later decisions have been very fully considered; whilst a slight mention only has been made of the more ancient cases, now, for the most part, indirectly overruled, or altogether inapplicable to the modern practice.

Before the time of Lord Mansfield, indeed, no regular system seems to have been formed for the government of the action; and that illustrious Judge, considering an ejectment as a fiction invented for the purposes of individual justice, endeavored to mould it into an equitable remedy, and to regulate it by maxims, in some degree independent of the general rules of law, as well as of the practice in other actions. The erroneous principles on which this system was founded were pointed out by the late Lord Kenyon; and a material alteration in the mode of conducting the action took place from the time of his Lordship's elevation to the Bench. By his sound and luminous decisions, the remedy has been placed upon its true principles; and he lived to see a system nearly completed, which, uniting the equitable fictions

of the particular action with the general principles of law, has preserved unbroken the great boundaries of our legal jurisprudence, and, at the same time, rendered the remedy most useful and comprehensive. The correct principles established by this great lawyer still prevail, having been uniformly maintained, and ably illustrated, by the more recent decisions of the different Courts.

The Author has enlarged upon these circumstances, in order to account for the personal judgment he has, in some instances, found it necessary to exercise with regard to decisions anterior to the time of Lord Kenyon; many cases being still extant as authorities, which seem wholly inconsistent with the modern principles of the action of ejectment.

The application of the remedy as between landlord and tenant, forms also a material part of this Treatise; and it has there been the Author's endeavor to give some useful practical directions respecting *notices to quit*, and the manner of proceeding on the forfeiture of a lease; at the same time explaining the principles upon which those directions are founded.

The evidence necessary to support and defend the action in common cases has also been considered; and instructions for proceeding according to the ancient practice have been added, as far as can be necessary at the present time.

For practical forms in ejectment, the reader is referred to those contained in Mr. Tidd's Appendix to his Practice of the Court of King's Bench; a collection which appears to the Author too complete to require addition, and too accurate to be susceptible of improvement.

5 Serjeants' inn, Fleet Street,
May 1, 1812.

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TABLE OF ABBREVIATIONS.

Ab. Abr.	Abridgment.
A. D.	Anno Domini, in the year of our Lord.
Addis. Rep.	Addison's Reports, (*Pa.*)
Adm'r. Adm'rs.	Administrator, Administrators.
Adm'x.	Administratrix.
Aik. Rep.	Aiken's Reports.
Alab. R.	Alabama Reports.
Am. Ch. Dig.	American Chancery Digest.
Amb.	Ambler's Reports.
And.	Anderson's Reports.
Andr.	Andrew's Reports.
Anon.	Anonymous.
Anst.	Anstruther's Reports.
Ante	Reference to a preceding page.
Ark. R.	Arkansas Reports.
Art.	Article.
Ashm. R.	Ashmead's Reports, (*Pa.*)
Atk.	Atkyn's Reports.
App. *or* Append.	Appendix.
Ass.	Assize (Book of;) Assizes.
Bac. Abr.	Bacon's Aridgment.
Barb. Rep.	Barbour's Reports, (*N. Y.*)
Barb. Ch. Rep.	Barbour's Chancery Reports, (*N. Y.*)
Barnes.	Barnes' Notes of Cases of Practice in Common Pleas.
Barn. & Ald. Rep.	Barnewall & Alderson's Reports.
Barn. & Cress. Rep.	Barnewell & Cresswell's Reports.
Barnard.	Barnardiston's Reports.
Bingh. Rep.	Bingham's Reports.
Binn. Rep.	Binney's Reports, (*Pa.*)

Bl. Blk. *or* Bl. Rep.	Sir William Blackstone's Reports.
Blk. Com.	Blackstone's Commentaries.
Blackf. R.	Blackford's Reports, (*Inda.*)
B. N. P. *or* Bull. N. P.	Buller's Nisi Prius.
B. & P. *or* Bos. & Pull.	Bosanquet & Puller's Reports.
B. R.	Banco Regis (in the King's Bench.)
Brayt. Rep.	Brayton's Reports, (*Vt.*)
Brev. R.	Brevard's Reports, (*S. C.*)
Bro. C. C.	Broke's Chancery Cases.
Bro. Cas. Parl.	Brown's Cases in Parliament.
Brod. &. Bingh. Rep.	Broderip & Bingham's Reports.
Brown	Brown's Reports.
Browne's Rep.	Browne's Reports, (*Pa.*)
Brown's Parl. Cas.	Brown's Parliament Cases.
Bunb.	Bunbury's Reports.
Burr. *or* Burr's Rep.	Burrow's Reports.
C. Ch. Chap.	Chapter.
Caines' Ca.	Caines' Cases in Error, (*N. Y.*)
Caines' Rep.	Caines' Reports, (*N. Y.*)
Call's Rep.	Call's Reports, (*Va.*)
Cam. & Norw. Rep.	Cameron & Norwood's Reports, (*Nor. Car.*)
Campb. *or* Camp. Ni. Pri. Rep.	Campbell's Reports, (*Nisi Prius.*)
Car.	Carolus (Charles.)
Carr. & P.'s Rep.	Carrington & Payne's Reports.
Cart. Rep.	Carter's Reports, (*Indiana.*)
Carth.	Carthew's Reports.
Cas. Pr. C. P.	Cases of Practice in Common Pleas.
Cas. Temp. Hard.	Cases, in the time of Lord Hardwicke.
C. B.	Communi Banco, in the Common Bench, or Court of Common Pleas.
Ch.	Chapter, Chancellor, Chancery.
Chan. Cas.	Cases in Chancery.
Chap.	Chapter.
Charlt. Rep.	Charleton's Reports, (*Ga.*)
Chip. Rep.	Chipman's Reports.
Circ.	Circuit.
Co. Cop.	Coke's Copyholder.
Co. Litt.	Coke on Littleton, (1*st institute.*)

Comb.	Comberbach's Reports.
Com. *or* Com. Rep.	Comyn's (Baron) Reports.
Comm.	Blackstone's Commentaries.
Comp. Incumb.	Complete Incumbent (Watson's Clergyman's Law.)
Conn.	Connecticut.
Conn. Rep.	Connecticut Reports.
Const. Rep.	Constitutional Reports, (*So. Car.*)
Cooper's Cas. in Ch.	Cooper's Cases in Chancery.
Cow. Rep.	Cowen's Reports, (*N. Y.*)
Cowp.	Cowper's Reports.
Cox's Rep.	Coxe's Reports, (*N. J.*)
C. P.	Common Pleas.
Cranch's Rep.	Cranch's Reports, (*U. S.*)
Cro.	Croke's Reports of Select Cases in King's Bench and Common Pleas.
Cro. Car.	Croke's Reports in the Time of *Charles I.*
Cro. Eliz.	Croke's Reports in the Time of *Elizabeth.*
Cro. Jac.	Croke's Reports in the Time of *James I.*
Cromp. Prac.	Crompton's Practice.
Cru. *or* Cruise's Dig.	Cruise's Digest.
Ct.	Court.
Cush. Rep.	Cushing's Reports, (*Mass.*)
Dal.	Dalison's Reports.
Dall. Rep.	Dallas' Reports, (*Pa & U. S.*)
Dana	Dana's Reports, (*Ky.*)
Dart's Vend. & Purchaser	Dart's Vendors & Purchasers of Real Estate.
Day's Rep.	Day's Reports, (*Conn.*)
Den. Rep.	Denio's Reports, (*N. Y.*)
Dev. & Bat. Eq.	Devereux & Battles' Equity Reports, (*N. C.*)
Dev. & Bat's Rep.	Devereux & Battle's Reports, (*N. C.*)
Dev.'s Rep.	Devereux's Reports, (*N. C.*)
Dick.	Dicken's Reports of Cases in Chancery.

Doc. Plac.	Doctrina Placitandi, Doctrine of Pleading.
Doug. *or* Doug. Rep.	Douglas' Reports.
Dud. R.	Dudley's Reports, (*Geo.*)
Dy.	Dyer's Reports.
E. *or* E. T.	Easter Term.
East, *or* East's Rep.	East's Reports.
Ed.	Edition.
Edw.	Edward.
Edw. Ch. Rep.	Edward's Chancery Reports, (*N. Y.*)
Eng.	English.
Esp. Ni. Pri.	Espinasse's *Nisi Prius* Digest.
Esp. *or* Esp. Rep.	Espinasse's Reports.
Eq. Rep. (Desauss.)	Equity Reports, Desaussure's, (*So. Car.*)
Eq. Ca. Abr.	Equity Cases Abridged.
Ex dem.	Ex Demissione, on the demise of.
Ex Rel. *or* Ex. Relat.	Ex Relatione, upon the relation of.
Ex.'r, Ex.'rs	Executor, Executors.
Ex.'x	Executrix.
Fairf. R.	Fairfield's Reports, (*Maine.*)
F. N. B.	Fitzherbert's Natura Brevium.
Fost. Rep.	Foster's Reports, (*N. H.*)
Freem.	Freeman's Reports.
Freem. C. R.	Freeman's Chancery Reports, (*Miss.*)
Gall. *or* Gallis. Rep.	Gallison's Reports, (*U. S.*)
Geo.	George.
Gilb. Eject.	Gilbert on Ejectment.
Gilb. Evid.	Gilbert on Evidence.
Gilb. Ten.	Gilbert on Tenures.
Gill. & John. R.	Gill & Johnson's Reports, (*Md.*)
Gilm. Rep.	Gillman's Reports, (*Ill.*)
Green C. R.	Green's Chancery Reports, (*N. J.*)
Greens Ia. Rep.	Greens Reports, (*Iowa.*)
Greenl. Rep.	Greenleaf's Reports, (*Me.*)
Gwill.	Gwillim.
Halst. Rep.	Halstead's Reports, (*N. J.*)
Hard. *or* Hard Rep.	Hardin's Reports, (*Ky.*)
Hardr.	Hardres' Reports.
Harr. & Gill's Rep.	Harris & Gill's Reports, (*Md.*)
Harr. & Johns. Rep.	Harris & Johnson's Reports, (*Md.*)

Harr. & M'Hen. Rep.	Harris & M'Henry's Reports, (*Md.*)
Hayw. Rep.	Haywood's Reports, (*N. Car.*)
Hawk. Rep.	Hawk's Reports, (*N. Car.*)
H. Bl. *or* H. Blk.	Henry Blackstone's Reports.
Hen.	Henry.
Hen. & Munf. Rep.	Hening & Munford's Reports, (*Va.*)
Hil.	Hilary Term.
Hill.	Hill's Reports, (*N. Y.*)
Hist.	History.
Hob.	Hobart's Reports.
Hoff. Ch. Rep.	Hoffman's Chancery Report, (*N. Y.*)
Holt's Rep.	Holt's Reports.
Hopk. Rep.	Hopkins' Chancery Reports, (*N. Y.*
How. R.	Howard's Reports. (*Miss. & U. S.*)
Humph. R.	Humphrey's Report's, (*Tenn.*)
Hutt.	Hutton's Reports.
Ill. Rep.	Illinois Reports.
Imp. K. B.	Impey's Practice of the King's Bench.
2 Inst.	Second Institute (Coke's Magna Charta.)
Ire. Eq.	Iredell's Equity, (*N. C.*)
Ire. R.	Iredell's Reports, (*N. C.*)
Jac.	Jacobus (James.)
Jac. & Walk. R.	Jacob & Walker's Reports.
Jenk. *or* Jenk. Cent.	Jenkin's Centuries of Reports.
Johns. Cas.	Johnson's Cases, (*N. Y.*)
Johns. Rep.	Johnson's Reports, (*N. Y.*)
Johns. Ch. Rep.	Johnson's Chancery Reports, (*N. Y.*)
Jones.	Jones' Reports.
Keb.	Keble's Reports.
Kirb. Rep.	Kirby's Reports, (*Conn.*)
Ky.	Kentucky.
Latch.	Latches' Cases.
Ld. Raym.	Lord Raymond's Reports.
Leigh R.	Leigh's Report's, (*Va.*)
Leon.	Leonard's Reports.
Lev.	Levinz's Reports.
Lill. Prac. Reg.	Lilly's Practical Register.
Litt.	Littleton.
Litt. Rep.	Littell's Reports, (*Ky.*)

Litt. Sel. Cas.	Littell's Selected Cases, (*Ky.*)
La. *or* Loua.	Louisiana.
Lut. *or* Lutw.	Lutwyche's Reports.
Maine R.	Maine Reports.
Marsh. Rep. (*Eng.* C. P.)	Marshall's Report's of the English Common Pleas.
Marsh. Rep. (*Ky.*)	Marshall's Reports, (*Ky.*)
Mart. Rep.	Martin's Reports, (*Loua.*)
Mart. Rep. (*N. S.*)	Martin's Reports, New Series, (*La.*)
Mal. & Yer. R.	Martin & Yerger's Reports, (*Tenn.*)
Mas. *or* Mason's Rep.	Mason's Reports, (*U. S.*)
Mass.	Massachusetts.
Mass. Rep.	Massachusetts Rep.
Metc. Rep.	Metcalf's Reports, (*Mass.*)
M'Cord's Ch. Rep.	M'Cord's Chancery Reports (*So Car.*)
M. & S. *or* Maule & S. Rep.	Maule & Selwyn's Reports.
Md.	Maryland.
Meig's R.	Meig's Reports, (*Tenn.*)
Meriv. *or* Meriv. Rep.	Merivale's Reports.
Miles' R.	Miles' Reports, (*Pa.*)
Misso. R.	Missouri Reports.
Mod.	Modern Reports.
Monr. R.	Monroe's Reports, (*Ky.*)
B. Mon. R.	B. Monroe's Reports, (*Ky.*)
Moore's Rep.	Moore's Reports.
M. Mic. *or* Mich.	Michaelmas Term.
M. S.	Manuscript.
Munf. R.	Munford's Reports, (*Va.*)
Murph. R.	Murphey's Reports, (*N. Car.*)
N.	Note.
Nels. *or* Nels. Abr.	Nelson's Abridgment.
New Hamp. Rep.	New Hampshire Reports.
N. P. *or* New Rep.	New Reports, (4th & 5th Bosanquet & Puller.)
N. Car. *or* Nor. Car.	North Carolina.
N. Car. Law. Rep.	North Carolina Law Repository.
N. J.	New Jersey.
Nott & M'C. Rep.	Nott & M'Cord's Reports, (*So Car.*)
N. S.	New Series.
N. Y.	New York.
Ohio Rep.	Ohio Reports, (*Hammond's.*)

P.	Paschalis, Easter Term.
Pa.	Pennsylvania.
Paige's Rep.	Paige's Chancery Reports, (*N. Y.*)
Paine's Rep.	Paine's Reports, (*U. S.*)
Palm.	Palmer.
Peake's N. P.	Peake's Nisi Prius Reports.
Penn. Rep.	Pennington's Reports, (*N. J.*)
Peter's Rep.	Peter's Reports, (*U. S.*)
Picker. Rep.	Pickering's Reports, (*Mass.*)
Plow. *or* Plowd.	Plowden's Reports.
Pop. *or* Poph.	Popham's Reports.
Post.	Reference to a subsequent page.
Porter's Rep.	Porter's Reports, (*Al.*)
Pr. Ch. *or* Prec. Cha.	Precedents in Chancery.
P. W. *or* P. Wms.	Peere Williams' Reports.
Rand. Rep.	Randolph's Reports, (*Va.*)
Rast. Ent.	Rastell's Entries.
Raym.	Sir Thomas Raymond's Reports.
Reev. E. L.	Reeve's History of the English Law.
Reg. Brev.	Register Brevium.
Rep.	Reports, Repository.
Rep. Constit. Ct. So. Car.	Reports of the Constitutional Court of South Carolina.
R. L. *or* Rev. L.	Revised Laws.
Roberts on Fraud. Conv.	Roberts on Fraudulent Conveyances
Robinson's R.	Robinson's Reports, (*Loua.*)
Roll. Abr.	Rolle's Abridgment.
Roll. Rep.	Rolle's Reports.
Root's Rep.	Root's Reports, (*Conn.*)
Run. Eject.	Runnington on Ejectment.
S. *or* Sec.	Section.
Salk.	Salkeld's Reports.
Sandf. Sup. Rep.	Sandford's Superior Court Reports, (*N. Y.*)
Sandf. Ch. Rep.	Sandford's Chancery Reports.
Saund.	Saunder's Reports.
Sav.	Saville's Reports.
Sax. C. R.	Saxton's Chancery Reports, (*N. J.*)
Say.	Sayer's Reports.
Sch. & Lefr. Rep.	Schoalers & Lefroy's Reports.
Seld. Rep.	Selden's Reports, (*N. Y.*)

Sell. Prac.	Sellon's Practice.
Selw. N. P. *or* S. N. P.	Selwyn's Nisi Prius.
Show.	Shower's Reports.
Serg. & R.'s Rep.	Sergeant & Rawle's Reports, (*Pa.*)
Sess.	Session.
Sid.	Siderfin's Reports.
Sir T. Jones.	Sir Thomas Jones' Reports.
Skin.	Skinner's Reports.
Sme. & Mar. R.	Smedes & Marshall's Reports, (*Miss.*)
Sme. & Mar. C. R.	Smedes & Marshall's Chancery Reports, (*Miss.*)
So. Car.	South Carolina.
South. Rep.	Southard's Reports, (*N. J.*)
Starkie's Rep.	Starkie's Reports, Nisi Prius.
St.	Statute.
Stewart's Rep.	Stewart's Reports, (*Al.*)
Stewart & Porter's Rep.	Stewart & Porter's Reports, (*Al.*)
Stra., Stran. *or* Stra. Rep.	Strange's Reports.
Sty. *or* Styles.	Styles' Reports.
T.	Term.
Tit.	Title.
T. *or* Trin.	Trinity Term.
T. R.	Term Reports, (Durnford & East's Reports.
Taunt. *or* Taunt. Rep.	Taunton's Reports.
Tayl. Rep.	Taylor's Reports, (*N. Car.*)
Tenn. Rep.	Tennessee Reports.
Tyl. Rep.	Tyler's Reports, (*Vt.*)
U. S.	United States.
Ut Semb.	Ut Semble, *as it seems.*
Va.	Virginia.
Vac.	Vacation.
Vent. *or* Ventris.	Ventris' Reports.
Verm. R.	Vermont Reports.
Vern.	Vernon's Reports.
Ves. *or* Ves. Rep. (Jun. or Sen.)	Vesey's Reports, (Junior or Senior.)
Ves. & Beame.	Vesey & Beame's Reports.
Vin. Abr.	Viner's Abridgment.
Virg. Cas.	Virginia Cases.
Virg. Rep.	Virginia Reports.

Vol.	Volume.
Walk. Copy.	Walker on Copyholds.
Wall. Rep.	Wallace's Reports, (*U. S.*)
Wash. Circ. Ct. Rep.	Washington Circuit Court Reports.
Wash. Rep.	Washington's Reports, (*Va.*)
Watts R.	Watts' Reports, (*Pa.*)
Watts & M. R.	Watts & Miles' Reports, (*Pa.*)
Watts & Serg. R.	Watts & Sergeant's Reports, (*Pa.*)
Watk. Cop.	Watkins on Copyholds.
Wen.	Wendell's Reports, (*N. Y.*)
Westmin.	Westminster.
Whar. R.	Wharton's Reports, (*Pa.*)
Wheat. R.	Wheaton's Reports, (*U. S.*)
Wight.	Wightwick's Reports in the Exchequer.
Willes.	Wille's Reports.
Wils. *or* Wils. Rep.	Wilson's Reports.
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A

TREATISE

ON THE

ACTION OF EJECTMENT.

CHAPTER I.

Of the Origin, Progress, and Nature of the Action of Ejectment.

The History of the English Law abounds in illustrations of the national attachment to ancient institutions, and of the reluctance with which, however imperious the necessity, the Courts depart from established maxims. The progress of society, and the consequent changes in manners and customs, are continually creating new personal rights, and demanding corresponding changes in judicial proceedings; and it is an interesting inquiry, though foreign to this Treatise, to trace out the various contrivances by which the Courts have in every period of our history adapted the principles of the ancient law to the exigencies of the passing time, and ingeniously contrived remedies for wrongs, which appear to have been unknown and unthought of when the common law was first introduced. The ordinary mode by which these improvements have been effected, has been by the invention *of some legal fiction which leaves the original maxim untouched, but engrafts upon it some deduction by which a remedy or form of proceeding is provided for the particular wrong, and out of which a new maxim or rule springs, for the redress of future wrongs of a similar nature. Indeed, it would seem that these fictions are coeval with the law itself

and form part of its simple beauty. "*In fictione legis consistit equitas*," is amongst its favorite maxims, and these fictions blend themselves with all the phases which the law has at different times assumed, and hold a conspicuous part in all judicial determinations. They may be traced in all gradations, from the great constitutional fiction, giving stability to the throne and security to the subject, which assumes that the King can do no wrong, to the amusing absurdity upon which the old Writ of *Quo minus* was founded, and which gave to the Court of Exchequer its civil jurisdiction.

The action of Ejectment stands prominently forward amongst these legal fictions. The writ upon which it is founded was not invented until the reign of Edward III., and although in its origin it was a mere action of trespass, enabling a lessee to recover damages when ousted of his possession, it has, by a series of the most ingenious fictions, gradually superseded and ultimately triumphed over the ancient remedies for the recovery of real property, and is now, by the provisions of a recent act of the Legislature,(*a*) which abolish, with one or two unimportant exceptions, all real actions, become the sole mode of legal proceedings in all cases where the right to real property is in dispute.[1]

(*a*) 3 & 4 Wm. 4, c. 27, s. 36.

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[1] Blackstone (3 Blk. Com. 200, *et seq.*,) gives by far the most concise, clear, and satisfactory narrative, of this ancient remedy, to be found in any of the books. He says:

"Since the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements. It may not, therefore, be improper to delineate, with some degree of minuteness, its history, the manner of its process, and the principles whereon it is grounded.

"We have before seen, that the writ of covenant, for breach of the contract contained in the lease for years, was anciently the only specific remedy for recovering against the lessor a term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger claiming under a title superior to that of the lessor, or by a grantee of the reversion, (who might at any time by a common recovery have destroyed the term,) though the lessee might still maintain an action of covenant against the lessor, for non-performance of his contract or lease, yet he could not by any means recover the term itself. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed by a real action recover possession of the freehold, but the lessee had no other remedy against the ejector but in damages, by a writ of *ejectione firmæ*, for the trespass committed in ejecting him from his farm. But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and, in the prosecution of a writ of ejectment, introduced a species of remedy not warranted by the original writ nor prayed by the declaration, (which are calculated for damages merely, and are silent as to any restitution,) viz.: a judgment to recover the term, and a writ of

In tracing this remedy through its several gradations, it will be found continually moulding itself to the condition of the times, and

possession thereupon. This method seems to have been settled as early as the reign of Edward IV.; though it hath been said to have first begun under Henry VII., because it probably was then first applied to its present principal use, that of trying the title to the land.

"The better to apprehend the contrivance, whereby this end is effected, we must recollect that the remedy by ejectment is, in its original, an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order, therefore, to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offence, called, in our law, *maintenance*, (of which in the next book,) to convey a title to another, when the grantor is not in possession of the land; and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance. When, therefore, the person who hath right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises; and being so in the possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee: and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land till the prior tenant, or he who had the previous possession, enters thereon afresh, and ousts him; or till some other person (either by accident or by agreement before-hand) comes upon the land, and thus turns him out or ejects him. For this injury, the lessee is entitled to his action of ejectment against the tenant, or this casual ejector, whichever it was that ousted him, to recover back his term and damages. But where this action is brought against such casual ejector as is before mentioned, and not against the very tenant in possession, the Court will not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore, it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession, (if any there be,) and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must, in case of any defence, make out four points before the court, viz.: *title*, *lease*, *entry*, and *ouster*. First, he must show a good title in his lessor, which brings the matter of right entirely before the Court; then, that the lessor, being seized or possessed by virtue of such title, did make him the lease for the present term; thirdly, that he, the lessee or plaintiff, did enter or take possession, in consequence of such lease; and then, lastly, that the defendant ousted or ejected him. Whereupon, he shall have judgment to recover his term and damages; and shall, in consequence, have a writ of possession, which the sheriff is to execute by delivering him the undisturbed and peaceable possession of his term.

"This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the Court, in order to show the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, save only as to the notice to the tenant, whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. But, as much trouble and formality were found to attend the actual making of the lease, entry, and ouster, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented somewhat more than a century ago, by the Lord Chief Justice Rolle, who then sat in the Court of Upper Bench; so called during the exile of King Charles the Second. This new method entirely depends upon a string of

extending its uses and powers, as the progress of civil society rendered necessary or convenient.

legal fictions; no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings, a lease for a term of years is stated to have been made, by him who claims title, to the plaintiff who brings the action; as, by John Rogers to Richard Smith, which plaintiff ought to be some real person, and not merely an ideal fictitious one, who hath no existence, as is frequently though unwarrantably practised. It is also stated that Smith, the lessee, entered; and that the defendant, William Stiles, who is called the casual ejector, ousted him: for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, Stiles, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration; withal assuring him that he, Stiles, the defendant, has no title at all to the premises, and shall make no defence; and, therefore, advising the tenant to appear in court and defend his own title; otherwise he, the casual ejector, will suffer judgment to be had against him; and thereby the actual tenant, Saunders, will inevitably be turned out of possession. On receipt of this friendly caution, if the tenant in possession does not, within a limited time, apply to the court to be admitted a defendant in the stead of Stiles, he is supposed to have no right at all; and, upon judgment being had against Stiles, the casual ejector, Saunders, the real tenant, will be turned out of possession by the sheriff.

But, if the tenant in possession applies to be made a defendant, it is allowed him upon this condition, that he enter into a rule of court to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action, viz.: the lease of Rogers, the lessor, the entry of Smith, the plaintiff, and his ouster by Saunders, himself, now made the defendant instead of Stiles; which requisites, being wholly fictitious, should the defendant put the plaintiff to prove them, he must of course be non-suited for want of evidence; but, by such stipulated confession of lease, entry, and ouster, the trial will now stand upon the merits of the title only. This done, the declaration is altered by inserting the name of George Saunders instead of William Stiles, and the cause goes down to trial under the name of Smith, (the plaintiff,) on the demise of Rogers, (the lessor,) against Saunders, the new defendant. And therein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But, if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for Richard Smith, the nominal plaintiff, who, by this trial, has proved the right of John Rogers, his supposed lessor. Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by statute, (11 Geo. II., ch. 19,) on pain of forfeiting three years' rent, to give notice to their landlors, when served with any declaration in ejectment; and any landlord may, by leave of the Court, be made a co-defendant to the action, in case the tenant himself appears to it; or, if he makes default, though judgment must be then signed against the casual ejector, yet execution shall be stayed, in case the landlord applies to be made a defendant, and enters into the common rule:—a right, which indeed the landlord had long before the provision of this statute; in like manner as (previous to the statute of Westm. 2, ch. 3,) if, in a real action, the tenant of the freehold made default, the remainderman or revisioner had a right to come in and defend the possession; least, if judgment were had against the tenant, the estate of those behind should be turned to a naked right. But, if the new defendants, whether landlord or tenant, or both, after entering into the common rule, fail to

*In the earlier periods of our history, estates for years, according to their present import, were unknown. Under the feudal system, [*2]

appear at the trial, and to confess lease, entry, and ouster, the plaintiff, Smith, must indeed be there non-suited, for want of proving those requisites; but judgment will, in the end, be entered against the casual ejector, Stiles; for, the condition on which Saunders, or his landlord, was admitted a defendant is broken, and, therefore, the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders, and delivered possession to Smith. The same process, therefore, as would have been had provided no conditional rule had been ever made, must now be pursued as soon as the condition is broken."

In Maine, any etsate of freehold, whether in fee simple, fee tail, or for life, may be recovered by a writ of entry, and all other writs are abolished. Rev. Sts. of Maine, ch. 145. This law came into effect from and after April 1st, 1843.

In Vermont, any person having claim to the seisin or possession of lands, tenements, or hereditaments, may have an action of ejectment, according to the nature of the case. Rev. Sts. of Verm., ch. 38.

In Massachusetts, all estates of freehold, whether in fee simple, fee tail, or for life, may be recovered by a writ of entry upon disseisin, and all other writs of entry are abolished. Rev. Sts. of Mass., ch. 101.

In New York, by the revised statutes, ejectment is substituted for all other actions to try claims respecting real property. Part 3, ch. 5, tit. 1, sec. 1 & 2, (vol. 2, p. 303.)

Sec. 1. The action of ejectment is retained, and may be brought in the cases and the manner heretofore accustomed, subject to the provisions hereinafter contained.

Sec. 2. It may also be brought,

1st. In the same cases to which a writ of right may now be brought by law to recover lands, tenements, or hereditaments; and by any person claiming an estate therein, in fee or for life, either as heir, devisee, or purchaser:

2nd. By any widow entitled to dower, or by a woman so entitled and her husband, after the expiration of six months from the time her right accrued, to recover her dower, of any lands, tenements, or hereditaments.

Part 3, ch. 5, tit. 7, sec. 24, (vol. 2. p. 343.)

Sec. 24. All writs of right, writs of dower, writs of entry, and writs of assize, all fines and common recoveries, and all other real actions known to the common law, not enumerated and retained in this chapter; and all writs and other process heretofore used in real actions, which are not specially retained in this chapter, shall be and they are hereby abolished.

The real actions "enumerated and retained in this chapter," are "nuisance" and "waste."

A party entitled to bring a writ of right, when the revised statutes went into operation, is not barred from a recovery in an action of ejectment, subsequently commenced, by the adverse possession of less than twenty-five years. *M'Cormick* v. *Barnum*, 10 Wend. 104.

The statutes of Michigan and Wisconsin, on this subject, are substantially the same as those of New York. Rev. Sts. of Mich., chs. 108, 109, 110, 111, 112, 113; Rev. Sts. of Wis., ch. 106.

In Connecticut, the action of ejectment is without the formalities and delays of real actions or the fictions of the writ of ejectment. It comes directly to its object in the simplest

war was the primary object even of legislation; and it is therefore not surprising, that the interests of the inferior tenantry were then disregarded, and the remedies for the recovery of lands altogether confined to freehold titles, vested in the superior landholders. The lords, indeed, seldom permitted their vassals to enjoy any interest in the lands they occupied, which could render them independent of their will; and even when they did grant them a right to the possession for a determinate period, as a stimulus to increase their industry, such grants were not considered as transferring to the grantee any title to the land, but merely as agreements or contracts between the lord and his vassal.

[*3] The old writ of covenant, adapted at that time to the recovery of the term, as well as of damages, was the only remedy to which the tenants were *entitled upon these leases. But this writ could only extend to cases in which there was a breach of the original contract, and the tenant was therefore without means of redress, when dispossessed of his land by the act of a stranger, not claiming under the grantor. Great difficulties also attended the proceedings upon the writ of covenant. It only lay between the immediate parties to the grant; and, as it frequently happened that the tenant was dispossessed by a person claiming under a subsequent feoffment from his grantor, and not by

form, and with all the ease and expedition of a personal action. Swift's Dig., vol 1, p. 517; 4 Conn. Rep. 276; 5 Ibid, 127; 12 Conn. Rep. 365.

The action of ejectment, with all its fictions, seems to be still in vogue in New Jersey. Rev. Sts. of N. J., tit. 34, ch. 1.

In Mississippi, in actions of ejectment, the process must be according to the course of the common law, except that the return thereof, must be made according to the laws of the state. Hutchinson's Mississippi Code, ch. 61, p. 876, sec. 84.

In Iowa, the proceedings for the recovery of real property, are extremely simple and direct. See Code of Iowa, ch. 116.

In Texas, the action of ejectment is abolished, and the method of trying titles to land or tenements is by action of trespass. Hart. Dig. of the Laws of Texas, p. 969, art. 3220.

In South Carolina, by the act of February, 1791, the form of proceding to recover land is changed into an action of trespass, to try titles; and ejectment is no longer brought. *Lynch* ads. *Withers*, 2 Bay's Rep. 117, (in note.)

In the state of Alabama, the statute of 17 December, 1831, (Laws of Alabama, 483,) abolishes the fictitious proceedings in ejectment, directs that the mode of trying title to land, &c., shall be by action of trespass, in which the plaintiff shall indorse on his writ, that the action is brought as well to try title as to recover damages: and that if the plaintiff shall recover, he shall be entitled to an execution for possession as well as for costs and damages. Vide *White* v. *Saint Guirons*, 1 Minor's Rep. Ala. 331.

"An ejectment is almost the only action for trying the titles to land in this state," [Pennsylvania.] *Morris' Lessee* v. *Van Deren*, Per M'Kean, Ch. J., 1 Dall. Rep. 67.

the grantor himself, he was then, notwithstanding the breach of the original contract, enabled to recover only damages for the injury he had sustained, but had no means of regaining possession of the land from which he had been ousted.(*a*)

So regardless, however, was the law, during the first ages after the Conquest, of grants of this nature, that until the time *of King Henry III. this writ of covenant remained the sole remedy of the grantee, even upon a breach of the grant. In that reign, the first symptoms of a more enlightened policy appeared; and, by the wisdom of the Court and council, a full remedy was provided for a termor, who was dispossessed of his land by any person whomsoever, claiming under the title of the grantor.(*a*)

The writ invented for this purpose was, according to Bracton,(*a*) called the writ of *quare ejecit infra terminum*, and required the defendant to show wherefore he deforced the plaintiff of certain lands, which A. had demised to him for a term then *unexpired, within which [*4] term the said A. sold the lands to the defendant, by reason of which sale the defendant ejected the plaintiff therefrom.

The language, indeed, used by Bracton,(*a*) when speaking of this writ, may, at first sight, induce an opinion that it was intended as a general remedy against all persons, even strangers, who ejected a lessee; and this interpretation has been adopted by a learned writer on the English law.(*b*) On a minute investigation, however, it will appear that Bracton meant only to include the grantor himself, or persons claiming under him. One passage certainly militates against this conclusion, "*Si autem alius quam qui tradidit ejecerit, si hoc fecerit cum* AUTORITATE *et* VOLUNTATE *tradentis, uterque tenetur hoc juditio, unus propter factum, et alius propter autoritatem. Si autem sine* VOLUNTATE, *tunc tenetur ejector utrique, tam domino proprietatis, quam firmario; firmario per istud breve, domino proprietatis per assisam novæ disseysinæ, ut unus rehabeat terminum cum damnis, et alius liberum tenementum suum sine damnis.*" But the difficulty is removed by the next sentence, in which he says, "*Si autem dominus proprietatis tenementum ad firmam traditum alicui dederit in dominico tenendum, †seysinam ei facere poterit* SALVO FIRMARIO TERMINO SUO." And it seems, therefore, that in the latter clause of the passage first above cited, particularly from the omission of

(*a*) Bracton, b. 4, f. 220.

(*b*) Reeves, Eng. Law, vol. 1, p. 341.

the word *autoritate* in it, Bracton only alluded to cases where the
[*5] grantor *had enfeoffed another, without intending thereby to injure his grantee, and such feoffee afterwards entered upon him. This interpretation is also most consistent with the spirit of the times in which Bracton wrote. It was then held that a man could not enter *vi et armis* into his own freehold, and the writ of *quare ejecit infra terminum* is not a writ of trespass *vi et armis*, which, if it had lain against those not having a title to the freehold, it naturally would have been. The old authorities(*a*) also, when describing the nature and effect of this writ, invariably speak of it as lying in those cases only where the ejector claims title under the grantor. A sale of the lands to the ejector is also stated in the body of the writ. And indeed, if the interpretation here contended for be incorrect, it seems quite unaccountable that, more than half a century after the time of Bracton, a new writ,
[*6] namely, the writ of *ejectione firmæ*, *which only gave the plaintiff damages, and did not restore the term, should have been invented for lessees against strangers, when one so much more beneficial was already in existence.

*The writ of *quare ejecit* might be drawn either as a *præcipe*, or a *si te fecerit securum*, and, when first invented, the *præcipe* was thought the better mode of proceeding, though, in process of time, the latter became more generally used. It is, perhaps, from this circumstance that Fitzherbert has considered the invention of the writ to be posterior to the statute of Westminster the second.(*b*)

(*a*) Thus, in Hil. Term, 3 Edward I. "In *quare ejecit* plaintiff shall recover his term, and damages by him sustained by reason of the sale." (Stat. Ab. tit. *qua. ejec.*) In the Reg. Brev. (p. 227.) "*Fuit hoc breve inventum per discretum virum Wilhelmum de Mertonut terminarius recuperet catalla sua versus* FEOFFATUM." In a case in Hil. Term, 46 Edw. III. 4. 12. per Fulthorpe, Justice, "If a stranger oust a lessee by reason of a *feoffment*, in that case he is put to his action upon the writ of *quare ejecit*;" and in the same case, per Finchden, J., "In such case, at the common law, the lessee had no other writ but his writ of covenant; and, although by the law a special writ of *quare ejecit* is ordered against a stranger, *a feoffee*, nevertheless the lessee is not out ousted of his writ of covenant against the lessor." This latter doctrine is exactly that laid down in Bracton. So also per Choke, J., (21 Edw. IV. 10, 30.) "*Quare ejecit, &c.*, lieth where one is in by title, *ejectione firmæ* where one is *by wrong*:" and *per totam curiam*, (19 Henry VI. 59, 19.) "If a man lease for years, and *sell* to F., who ousts the termor, the lessee shall have a *quare ejecit*, and recover his term and damages."

(*b*) The inaccuracy of Fitzherbert, when speaking of this writ, is remarkable. He considers its invention as posterior to the statute of Westminster 2, (13 Edw. I.) and as intended to remedy a partial evil, occasioned by the writ of *ejectione firmæ*. (F. N. B. 458.) Bracton, however, who wrote in the reign of Henry III., speaks of the writ as in use in his

The plaintiff by this writ, as by the old writ of covenant, recovered both his term and damages, if the term were unexpired; or his damages only, in case of its expiration before the judgment; but the great advantage he derived from it was the power of proceeding against third persons, as well as against the original grantor.

*Notwithstanding this favorable alteration, the farmer was still [*7] without remedy, when dispossessed by a mere stranger not claiming under his grantor. But an ouster by a stranger could then rarely happen; and if at any time the vassal was so dispossessed, he would throw himself on the protection of his lessor, abandon his own claim, and leave the lord to recover, by a real action, both the freehold and possession.

In process of time, however, the vassal demanded a remedy *for himself, and in the reign of King Edward II., or in the early part of that of Edward III.,(a) a writ was invented, which gave a lessee for years a remedy (though in some respects an imperfect one) against all persons whatsoever, who ousted him of his term; excepting indeed where the grantor himself ejected his lessee, and subsequently enfeoffed another, in which case the old writ of *quare ejecit* was resorted to.

This new writ was a writ of trespass in its nature. The process upon it, as upon all other writs of trespass, was by attachment, distress, and process of outlawry. It called upon the defendant to show, wherefore, with force and arms, he entered upon certain lands which had been demised to the plaintiff for a term then unexpired, and ejected him from the possession thereof; and comprised all cases, within the single exception already mentioned, in which the second lessee, coming into possession by means of a *title, could not be said to be a [*8] trespasser. Even the grantor was liable to be sued upon this new writ, notwithstanding the old doctrine, that a man could not enter

time, and as having been invented to remedy the inconveniences attendant on the old writ of covenant. In the Reg. Brev. (227,) also, the same reasons are given for its origin. The inaccuracy is evident also from another circumstance. WALTER DE MERTON, called by Fitzherbert *William de Moreton*, and in the Reg. Brev. *William de Merton*, (the inventor of the writ,) was Chancellor in the reign of Henry III. (Dugdale's Chron.) and died in the sixth year of Edward I. (Matt. Westmon. p. 366,) seven years before the statute of Westminster 2 was enacted. F. N. B. 458.

(a) The first recorded instance of an action of *ejectione firmæ* is in the 44th year of Edward III. (Trin. 44 Edw. III., 22, 26.)

vi et armis into his own freehold.(*a*) As, however, the plaintiff did not possess a freehold interest, his title to the lands was only so far acknowledged in this action as to give him damages for the injury he had sustained, but not to restore to him the possession of his term.

It is upon this writ, though apparently so dissimilar from the present practice, that the modern remedy by ejectment is founded.

Whilst the feudal system continued in its vigor, and estates for years retained their original character, but little inconvenience resulted to tenants from this imperfect remedy. But when the feudal policy declined, and agriculture became an *object of legislative regard, the value and importance of estates of this nature considerably increased, and it was necessary to afford to lessees for years a more effectual protection. It then became the practice for leaseholders, when disturbed in their possessions, to apply to Courts of Equity for redress, and to prosecute suits against the lessor himself, to obtain a specific performance of the grant, or against strangers for perpetual injunctions to quit the possession; and these Courts would then compel a restitution of the land itself to the party immediately injured.(*b*)

[*9] The Courts of common law soon afterwards adopted *this method of rendering substantial justice; not indeed by the invention of a new writ, which perhaps would have been the best and most prudent method, but by adapting the one already in existence to the circumstances of the times; and introducing, in the prosecution of a writ of ejectment, a species of remedy neither warranted by the original writ, nor demanded by the declaration, namely, a judgment to recover the term, and a writ of possession thereupon.

It is singular, that neither the causes which led to this important change, nor the principles upon which it was founded, are recorded in any of the legal authorities of those times; it is difficult, if not impossible, to ascertain with accuracy the precise period when the alteration itself took place; although it certainly must have been made between the years 1455 and 1499, since in the former year it is said by one of the Judges,(*c*) that damages only can be recovered in ejectment; and

(*a*) F. N. B. 505.
(*b*) Gilb. Eject. p. 2.
(*c*) Per Choke, J., Mich. 33 Hen. VI. 42, 19.

an entry of a judgment is still extant, given in the latter of those years, that the plaintiff in ejectment shall recover both his damages and his term.(*a*) It is said, indeed, in argument as early as the year 1458, that the term may be *recovered in ejectment, but no reason is assigned for the assertion, nor is any decision upon the point on record until the time of the entry already mentioned.(*b*)

But, whatever might be the cause which *occasioned this [*10] alteration, the effects they produced were highly important. A new efficacy was given to the action of ejectment, the old real actions fell into disuse, and the action of ejectment became gradually the regular mode of proceeding for the trial of possessory titles.

That an action of ejectment, by means of this alteration in its judgment, might restore termors to possession who had been actually ejected from their lands, is sufficiently obvious; but it is not perhaps so evident how the same proceedings could be applicable to a disputed title of freehold, or why, as soon after happened, the freeholder should have adopted this novel remedy. No report of the case, in which this bold experiment was first made, is extant; but from the innumerable difficulties which attend real actions, it is not surprising that the freeholders should take advantage of any fiction which enabled him to avoid them; and as the Court of Common Pleas possessed an exclusive right of judicature in matters of real property, it is probable that the experiment originated in the Court of King's Bench, as an indirect method of giving to that Court a concurrent jurisdiction with the Common Pleas. But however this may be, the experiment succeeded, and the use of the action, as well as its nature, were changed.

When first the remedy was applied to the trial of disputed titles, the proceedings were simple and regular; differing but little from those previously in use, when an ejectment was †brought to recover the damages of an actual trespass. The right to the *freehold [*11] could only be determined in an indirect manner. It was a term which was to be recovered by the judgment in the action, and it was therefore necessary that a term should be created; and as the injury complained of in the writ was the loss of the possession, it was also

(*a*) Rast. Ent. 253(*a*).

(*b*) Brooke's Ab. tit. *Quare ejecit*, folio 167. Vide *Doe d. Poole* v. *Ebrington*, 1 Ad. & Ell. 756, note (*a*).

necessary that the person to whom the term was given should be ejected from the lands.

In order to obtain the first of these requisites, namely, a term, the party claiming title entered upon the disputed premises, accompanied by another person, to whom, whilst on the lands, he sealed and delivered a lease for years. This actual entry was absolutely necessary; for, according to the old law of maintenance, it was a penal offence to convey a title to another, when the grantor himself was not in possession. And, indeed, it was at first doubted whether this nominal possession, taken only for the purpose of trying the title, was sufficient to excuse him from the penalties of that offence.(*a*)

It is from the necessity of this entry, that the remedy by ejectment is confined to cases in which the claimant has a possessory title, that is to say, a right of entry upon the lands. Whenever, by reason of the intervention of any of the ancient rules regarding real property, as by descent cast, discontinuance, or warranty, the possessory right was turned into a right of action, the right of entry ceasing therewith, the entry of the claimant of course became illegal, and consequently not sufficient to enable him to convey a title to his lessee, the nominal plaintiff in the action; and as the principles of the action have remained unchanged, although the character of its proceeding have been altered, the right to make an entry has continued to be requisite, although the entry itself has ceased to be necessary.[1] This defect in

(*a*) 1 Ch. Rep. Append. 39.

[1] Ejectment will not lie by a person already in possession of the premises. *Jackson ex dem. Clowes* v. *Hakes*, 2 Cainc' Rep. 335.

Without a right of entry, the plaintiff cannot recover in an action of ejectment. *Colston* v. *M'Vay*, 1 Marsh. Rep. (Ky.) 251.

When a person recovers a judgment in ejectment, and neglects to enforce it within the period laid in his demise, his right of entry under that judgment is altogether gone, and if there have been an adverse possession for twenty years, during which such judgment was recovered, it will not avail him to take the case out of the statute of limitations. *Jackson ex dem Beekman et al.* v. *Haviland*, 13 Johns. Rep. 229.

A lessor in ejectment ought to have a subsisting title or interest in the premises. *Jackson ex dem. Starr et ux.* v. *Richmond*, 4 Johns. Rep. 483; *Jackson ex dem. Livingston*, v. *Sclover*, 10 Johns. Rep. 368.

An entry into part of a tract of land, with a claim to the whole, is equivalent to an entry into the whole. *Jackson ex dem. Gansevoort et al.* v. *Lunn*, 3 Johns. Cas. 109.

Trespass to recover possession may be maintained on a contract between the owner of the fee and the plaintiff, in which it is agreed that the plaintiff shall settle, and within three

the remedy has been recently *provided against by the stat. 3 & 4 Wm. 4, c. 27, s. 39, which, by enacting that no descent cast, discon-

years make certain improvements on the land, and on performance of certain conditions shall have title in fee: and a stranger to the contract cannot resist the recovery of possession, on the ground that the plaintiff has not performed, or has forfeited its conditions. *White* v. *Saint Guirons*, 1 Minor's Rep. (Alabama,) 331.

In an action of ejectment, it was held, that an actual entry was not necessary in any case, except to avoid a fine. *Jackson ex dem. Brouck* v. *Crysler*, 1 Johns. Cas. 125.

It is not necessary, to entitle the owner of land to recover in ejectment, that he should prove that he, or those under whom he claims, have been in possession within twenty-one years, [*the time limited by the laws of Pennsylvania*] before bringing suit. Possession, by operation of law, accompanies the title, unless the contrary is shown, and until it is shown. *Hawk.* v. *Senseman and others*, 6 Serg. & R. Rep. 21, 23, and vide *Clay* v. *White and others*, 1 Munf. Rep. 162.

A previous entry on the land is not necessary to enable the plaintiff to support his action; the action of ejectment may be maintained, if the plaintiff *have a right* to enter. "The question is not whether he *has* entered, but whether he *may enter*." *Lessee of Rugge* v. *Ellis*, 1 Bay's Rep. 107, 111; *Hylton's Lessee* v. *Brown*, 1 Wash. Circ. Ct. Rep. 204.

The plaintiff in ejectment need not be in actual possession within seven years; if he has a title by deed or grant, he has a constructive possession by operation of law, which preserves his right of entry, until it be destroyed by an actual adverse possession, continued for seven years together; if he has never seen his land—if he has not entered upon it for fifty years, his title may be good, if his adversary hath not been in possession for seven years continually, during the whole time with a color of title. *Young* v. *Irwin*, 2 Hayw. Rep. 11.

In such action a right of entry and possession is sufficient, and it is not necessary to prove a previous possession in the plaintiff, nor an actual ouster. *White* v. *Saint Guirons*, 1 Minor's Rep. (Alabama,) 331.

"In this country there is no necessity for an entry until an actual adverse possession commences, and that actual adverse possession must have continued for seven years without entry or claim on the other side, before it can toll the plaintiff's right of entry. The contrary doctrine in this country would be attended with consequences very fatal to titles for land." *Den ex dem. Park* v. *Cochran et al.* 1 Hayw. Rep. 180, and vide *Den ex dem. Slade* v. *Smith*, ibid. 249. *Taylor* v. *Buckner*, 2 Marsh. Rep. (Ky.) 19.

In order to support even a writ of right, it is not necessary to prove an actual entry under title, or actual taking of esplees, a constructive seisin in deed is sufficient. *Green* v. *Liter and others*, 8 Cranch's Rep. 229.

The construction which would require an entry into lands, by the owner, within a limited time after the title accrued, unless there be some adversary title or possession to be defeated by such entry, "is totally inadmissible. How such an opinion could have been entertained, is unaccountable. There is no foundation for it." Per Marshall, Ch. J., delivering the opinion of the court, in *Shearman* v. *Irvine's Lessee*, 4 Cranch's Rep. 369.

It is not necessary that either the lessor of the plaintiff or his ancestors should ever have had *actual* possession; *legal* possession or *seisin in law* is sufficient to sustain his suit. In *Jackson ex dem. Beekman* v. *Sellick*, 8 Johns. Rep. 262, it was decided, that where a *feme covert* is the owner of wild and uncultivated land, she is considered in law, as in fact, possessed, so as to enable her husband to become a tenant by the curtesy—and Kent, Ch. J., in delivering the opinion of the court, among other things said, "There was no *pedis pos-*

tinuance, or warranty, shall hereafter defeat any right of entry or action for the recovery of any land, has converted all titles into pos-

sessio or possession in fact, of the premises, in the popular sense of the words, by either Matthews or his wife during the coverture; for the lands continued vacant, or remained as new lands, wild and uncultivated, from the date of the patent in 1704, to the time of the commencement of the adverse possession in 1772. The title under the patent, to an undivided eighth part of the premises, clearly existed in Matthews' wife. She derived it by will from her mother, who was one of the four co-heirs of Henry Van Ball. The question is, was she not to be considered as seised in fact of these premises, so as to enable her husband to become a tenant by the curtesy? To deny this, would be extinguishing the title of tenant by the curtesy, to all wild and uncultivated land. It has long been a settled point, that the owner of such lands is to be deemed in possession, so as to maintain trespass. The possession of such property follows the title and so continues, until an adverse possession is clearly made out. This is the uniform doctrine of this court; and there is no reason why the same rule should not apply where the title by curtesy is in question." And after citing Co. Litt. 20, a.; *De Grey* v. *Richardson*, 3 Atk. 469, and *Sterling* v. *Penlington*, (7 Viner, 149, pl. 11, Curtesy A.) he adds: "These cases are as strong as the present, and prove that actual entry or *pedis possessio* is not absolutely requisite, and that if the party is constructively seised in fact it will be sufficient." This case was cited and confirmed in *Jackson ex dem. Austin et al.* v. *Howe et al.*, 14 Johns. Rep. 406; and in *Jackson ex dem. Swartwout et ux.* v. *Johnson*, 5 Cow. Rep. 102, and in *Jackson ex dem. Woodruff et al.* v. *Gilchrist*, 15 Johns. Rep. 117.

But in the case of *Den ex dem. Johnson* v. *Morris*, (2 Halstead's Rep. 6,) it was held that the lessor of the plaintiff, in an action of ejectment, must always count upon and show a possession of the land within the time to which the right of entry is limited: viz., within twenty years next before the action is brought. But he need not show a possession of twenty complete years, or of any other number of years, further than is necessary to constitute a full and peaceable possession. And the possession to be proved, being a mere matter *in pais*, may be shown as well without deed as with it; though when without it, it will always be looked upon with greater jealousy, and be overcome with greater ease.

And in the case of *Clay* v. *Ransome*, (1 Munf. Rep. 445,) the court said, "An ejectment is a possessory action, and only a competent remedy where the lessor of the plaintiff may *enter;* therefore, it is always necessary for the plaintiff to show that his lessor had a *right to enter*, by *proving* a possession within twenty years, or *accounting for the want of it* under some of the exceptions allowed by the statute."

But the same court, in the case of *Clay* v. *White, et al.* (1 Munf. Rep, 162, 170,) said, (Tucker, J., delivering the opinion of the court,) "Upon common law principles, then, I am of opinion that an actual entry into waste and unappropriated lands granted by the commonwealth is not necessary, and in order to complete the patentee's title thereto; but that the same is, upon delivery of the patent, absolute and complete for every purpose whatsoever, whether to maintain an action, or to transmit an inheritance, or to grant the same by deed, or by last will and testament." And vide, *See* v. *Greenlee*, 6 Munf. Rep. 303.

The heirs of a mortgagee, or, in case of their non-residence, the executor or administrator of the mortgagee, may sustain ejectment for the mortgaged premises against the mortgagor, or his tenant claiming under a lease granted after the mortgage, without the privity of the mortgagee; and the suit, in such case, may be brought without a demand of possession *Brown* v. *Mace*, 7 Blackf. Rep. 2.

It seems, that the statute of 21 Jac. 1, c. 16, did not extend to the province of Maryland.

sessory titles, and thus made the remedy by ejectment of universal application.[1]

*The lessee of the claimant, having acquired a right to the possession, by means of the lease already mentioned, remained upon the land, and then the person who came next upon the freehold, *animo possidendi*, or, according to the old authorities, even by chance,(*a*) was accounted an ejector of the lessee, and a trespasser on his possession. A writ of trespass and ejectment was then served upon the ejector by the lessee. The cause regularly proceeds to trial, as in the common action of trespass; and, as the lessee's claim could only be founded upon the title of his lessor, it was necessary to prove the lessor's interest in the land, to enable the plaintiff (the lessee) to obtain a verdict. The claimant's title was thus indirectly determined; and although the writ of possession must of course have been issued in the plaintiff's name, and not in his own, yet, as the plaintiff had prosecuted the suit only as the lessor's friend, he would immediately give up to him the possession of the lands. [*12]

In the infancy of the experiment, this mode of proceeding could be attended with no ill consequences. As the party previously in possession must, in contemplation of the law, be upon the lands, and certainly, *animo possidendi*, the friend of the claimant, was allowed to consider him as an ejector, and make him the defendant in the action. When, however, the remedy became more generally used, this simple method was found to be productive of considerable evil. It was easy

(*a*) 1 Lil. Prac. Reg. 673.

Lloyd's Lessee v. *Hemsley*, 1 Har. & M'Hen. Rep. 28. *Lee's Lessee* v. *Blayden et al*, ibid, 30. *Drane* v. *Hodges*, ibid, 518.

A deed of bargain and sale in New Jersey passed the possession, without any actual entry by the bargainee, and this possession the law presumes to continue, until the contrary is proved. *Lessee of Bayard* v. *Colfax et al.*, C. C. U. S. N. J. April, 1821, M. S. (Cited in Coxe's Digest, p. 555.)

It is declared unnecessary, by the Revised Statutes of New York, part 3, chap. 5, tit. 1, sec. 25. (Vol. 2, p. 306.)

Sec. 25. It shall not be necessary for the plaintiff to prove an actual entry under title, nor the actual receipt of any profits of the premises demanded; but it shall be sufficient for him to show a right to the possession of such premises, at the time of the commencement of the suit, as heir, devisee, purchaser, or otherwise.

There is a statute similar to the foregoing in Massachusetts. Rev. Sts. of Mass., ch. 101, sec. 4; Maine—Rev. Sts. of Maine, tit. 10, ch. 145, sec. 6.

[1] See Rev. Sts. of Maine, tit. 10, ch. 145, sec. 8.

[*13] for the claimant to conceal the *proceedings from the person in possession, and to procure a second friend to enter upon the lands, and eject his lessee immediately after the execution and delivery of the lease. The lessee would then commence his *suit against this ejector, and the party in possession might consequently be ousted of his lands, without any opportunity of defending his title. To check this evil, a rule of Court was made, forbidding a plaintiff in ejectment to proceed against such third person, without giving a previous notice of the proceedings to the party in possession; and it was the practice for such party, on the receipt of this notice, if he had any title to the lands, to apply to the Court for permission to defend the action, which application was uniformly granted, upon his undertaking to indemnify the defendant (the third person) from the expenses of the suit. The action, however, proceeded in the name of such defendant, though the person in possession was permitted at the trial to give evidence of his own title.

A considerable alteration in the manner of proceeding in the action was occasioned by this rule, although it was only intended to remedy a particular evil. It became general practice to have the lessee ejected by some third person, since called the casual ejector, and to give the regular notice to the person in possession, instead of making him, as before, the trespasser and defendant. A reasonable time was allowed by the Courts, for the person in possession, after the receipt of the notice, to make his application for leave to defend the action,
[*14] and, if he *neglected to do so, the suit proceeded against the ejector, as if no notice had been necessary.

The time when this rule was made is unknown, but as the evil it was intended to remove must soon have been discovered, it probably was adopted shortly after the remedy grew into general use.(*a*) It seems, also, to have been the first instance in which the Courts interfered in the practice of the action, and, is, therefore, remarkable as the foundation of the fictitious system, by which it is now conducted.

†In this state, with the exception of a few practical regulations, not necessary to be here noticed, the action of ejectment continued until the time of the Commonwealth. Much trouble and inconvenience, however, attended the observance of the different formalities. If several

(*a*) *Fairclaim d. Fowler* v. *Shamtitle*, Burr. 1290–1297.

persons were in possession of the disputed lands, it was necessary to execute separate leases upon the premises of the different tenants, and to commence separate actions upon the several leases.(*a*) Difficulties also attended the making of entries, and the action of ejectment had by this time grown into such general use, as to make these inconveniences sensibly felt. A remedy, however, was discovered for them by Lord Chief Justice Rolle, who presided in the Court of Upper Bench during the Protectorate; and a method of proceeding in *eject- [*15] ment was invented by him, which at once superseded the ancient practice, and has, by degrees, become fully adapted to the modern uses of the action.(*b*)

By the new system, all the forms which we have been describing are dispensed with. No lease is sealed, no entry or ouster really made; the plaintiff and defendant in the suit are merely fictitious names; and, in fact, all those preliminaries are now only feigned, which the ancient practice required to be actually complied with.

An inquiry into the numerous regulations which have been made for the improvement of the modern practice, must be reserved for a future part of this work; but it may be useful to give in this place, a brief outline of the system, although a detailed account will be hereafter necessary.

A., the person claiming title, delivers to *B.*, the person in possession, a declaration in ejectment, in which *C.* and *D.*, two fictitious persons, are made respectively plaintiff and *defendant; and in which *C.* states a fictitious demise of the lands in question from *A.*, to himself for a term of years, and complains of an ouster from them by *D.*, during its continuance. To this declaration is annexed a notice, supposed to be written and signed by *D.*, informing *B.* of the proceedings, and advising him to apply to the Court *for permission to be made [*16] defendant in his place, as he, having no title, shall leave the suit undefended. Upon the receipt of this declaration, if *B.* do not apply within a limited time to be made defendant, he is supposed to have no title to the premises; and upon an affidavit that a declaration has been regularly served upon him, the Court will order judgment to be entered against *D.*, the casual ejector, and possession of the lands will be

(*a*) Co. Litt. 252; *Argoll* v. *Cheney*, Palm. 402.
(*b*) Styles, Prac. Reg. 108. (ed. 1657.)

given to *A.*, the party claiming title. When, however, *B.* applies, pursuant to the notice, to defend the action, the Courts annex certain conditions to the privilege. Four things are necessary to enable a person to support an ejectment, namely, title, lease, entry, and ouster; and as the three latter are only feigned in the modern practice, *C.*, (the plaintiff,) would be non-suited at the trial if he were obliged to prove them. The Courts, therefore, compel *B.*, if made defendant, to enter into a rule, generally termed *the consent-rule*, by which he undertakes, that at the trial he will confess the lease, entry, and ouster to have been regularly made, and rely solely upon the merits of his title; and, lest at the trial he should break this engagement, another condition is also added, that in such case, he shall pay the costs of the suit, and shall allow judgment to be entered against *D.*, the casual ejector. These conditions being complied with, the declaration is altered, by making *B.* the defendant instead of *D.*, and the cause proceeds to trial in the same manner as in other actions.[1]

[*17] The advantages resulting from this method are *obvious: the claimant is exempted from the observance of useless forms,

[1] In the state of New York, the use of these fictitious names is now abolished, and the revised statutes provide that, if the premises for which the action is brought are actually occupied by any person, such occupant shall be named defendant in the declaration; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit. (Rev. Sts. of N. Y., 4th ed., Banks, Gould, & Co., 1852, vol. 2, p. 566, sec. 4; see 12 Wendell's Rep. 558.

In New York, the fictions which were required under the former practice, relative to the lease or demise to the plaintiff, and an ejectment by a casual or nominal ejector, have been also abolished. (Ib., sec. 6.) And in relation to the form of the declaration, the revised statutes now provide that it shall be sufficient for the plaintiff to aver in his declaration, that on some day therein to be specified, and which shall be after his title accrued, he was possessed of the premises in question, describing them, and being so possessed thereof, that the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof to his damage—any nominal sum the plaintiff shall think proper to state. Ib. sec. 7; see 10 Wend. 414; 12 do. 171; 5 Hill, 50.

The provisions of the revised statutes of New York, on this subject, have been substantially re-enacted in Michigan. See Rev. Sts. of Mich., tit. 23, ch. 108, secs. 3, 4, 5, and 6; Wisconsin—Rev. Sts. of Wis., ch. 106.

The fictitious part of the action has also been abolished in Virginia. Rev. Code of Va. of 1849, tit. 40, ch. 135, secs. 4, 5, and 6; also in Vermont—Rev. Sts. of Verm., ch. 38, sec. 1; so in Connecticut—Swift's Dig., vol. 1, p. 517; Iowa—Code of Iowa, ch. 116; Texas—Hartley's Dig. of L. of Texas, p. 969, art. 3220; Alabama—*Masters* v. *Eastis*, 3 Porter's Rep. 368; in Illinois—*Gillespie* v. *Reed*, 3 M'Lean, 377.

See *ante*, note to page 2.

and the tenant admits nothing which can prejudice the merits of the case.

*It could not, indeed, be expected that a change so extensive should, in the first instance, be entirely free from defects; nor that it would not, like other innovations, occasion some inconvenience when first introduced. For a few years after its invention, the Courts seem occasionally to have been confused between the ancient and modern systems, and not to have established, so distinctly as might have been desired, the principles which were to regulate the proceedings they had so newly adopted. The action has, however, now attained a considerable degree of perfection. Its principles are clearly understood, and its practice is reduced to a regular and settled system. The Legislature has frequently interfered to correct its deficiencies. The Courts continue to regard it with great liberality; and the remedy by ejectment has now become a most useful legal proceeding, unembarrassed by the difficulties formerly attendant upon real actions, and well adapted to the purposes of substantial justice.

*CHAPTER II.

Of what things an Ejectment will lie, and how they are to be described.

By the common law, an ejectment will not lie for any thing whereon an entry cannot be made, or of which the sheriff cannot deliver possession; or, in other words, it is only maintainable for corporeal hereditaments.[1] Thus, an ejectment will not lie for a rent, an advowson, a common in gross, or *pur cause de vicinage*, or any other thing which passes only by grant. Tithes, indeed, though an incorporeal inheritance, may be recovered by this action, but the right of maintaining an ejectment for them, does not arise from the common law, but is given by the provisions of the statute, 32 Hen. VIII. c. 7.

An ejectment will not lie for lands belonging to the Crown of which the Crown is in possession by its officer; the proper remedy is by petition of right.(*a*)

(*a*) *Doe d. Legh* v. *Roe*, 8 M. & W. 579.

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[1] The general rule is, that an action of ejectment will lie for anything attached to the soil, of which the sheriff can deliver possession. *Jackson ex dem. Saxton* v. *May*, 16 Johns. Rep. 184.

Wherever a right of entry exists, and the interest is tangible, so that possession of it can be delivered, an ejectment will lie for it. *Jackson ex dem. Loux et al.* v. *Buel*, 9 Johns. Rep. 298.

If the owner of lands allows another to erect buildings upon it, under a contract that when the buildings are completed, he will either pay for them or convey the land at his election, ejectment will lie upon ouster of the builder, before such election is made. And if a creditor of him who owns the fee, levy an execution on the land, and do not include the buildings in the appraisement, ejectment will lie by the creditor of the builder, who has levied an execution on any section of the buildings. *King* v. *Catlin*, 1 Tyler's Rep. 355.

Ejectment will only lie for things whereof possession may be delivered by the sheriff. *Black* v. *Hepburne et al.*, 2 Yeates' Rep. 331; *Farley* v. *Craig*, 3 Green's Rep. 192.

It will lie to recover possession of a room in a house. *White* v. *White*, 1 Harrington's Rep. 202.

It will not lie, in New Jersey, to recover an incorporeal hereditament. *Den* v. *Craig*, 3 Green. 191.

An equitable estate is not sufficient to support an ejectment in the Circuit Court. 3 Wash. 33. In Pennsylvania, the owner of an equitable title may recover in ejectment or partition. *Willing* v. *Brown*, 7 Serg. & Rawle, 467.

It was formerly holden that an ejectment did not lie for a church or chapel, though corporeal hereditaments, because they were *res sacræ*, and, therefore, not demisable; but this doctrine is now exploded, though in point of form they should be still demanded as *mes- [*19] *suages*.(*a*)

But an ejectment will not lie for a canonry, for a canonry is "an ecclesiastical office, only capable of being held by a person in priest's orders," and such spiritual right cannot be *delivered under a writ of possession; and for the like reason ejectment will not lie for a prebendal stall.(*b*)

A common appendant or appurtenant, may be recovered in an ejectment, brought for the lands to which it is appendant or appurtenant, provided, such right of common be mentioned in the description of the premises; because, he who has possession of the land has also possession of the common; and the sheriff, by giving possession of the one, executes the writ as to the other. But it may be prudent to state in the description, that the common so claimed is a common appendant or appurtenant, although it has been held after verdict, that an ejectment for lands and also for "common of pasture," generally, is sufficient.(*c*)

An ejectment will also lie for a boilary of salt, although, by the grant of a boilary of salt, the grantee is only entitled to a certain proportion of the number of buckets of salt water drawn out of a particular salt-water well; for, by the grant of a boilary of salt, the soil shall pass, inasmuch as it is the whole profit of the soil.(*d*)

*Upon the same principle, an ejectment may be maintained [*20] for a coal mine; for it is not to be considered as a bare profit *apprender*, but as comprehending the ground or soil itself, which may be delivered in execution; and, though a man may have a right to the mine without any title to the soil, yet, the mine being fixed in a certain place, the sheriff has a thing certain before him of which he can deliver possession.(*e*)

(*a*) *Harpur's case*, 11 Co. 25 (*b.*); *Thyn* v. *Thyn*, Styles, 101; Doc. Plac. 291; *Hillingsworth* v. *Brewster*, Salk. 256.

(*b*) *Doe d. Butcher* v. *Musgrave*, 1 Man. & G. 625; *et vide*, *Rex* v. *the Bishop of London*, 1 Wils. 11, 14.

(*c*) *Baker* v. *Roe*, Cas. Temp. Hard. 127; *Newman* v. *Holdmyfast*, Stran. 54.

(*d*) *Smith* v. *Barrett*, Sid. 161; S. C., 1 Lev. 114; Co. Litt. 4, (*b.*)

(*e*) *Comyn* v. *Kineto*, Cro. Jac. 150; *Comyn* v. *Wheatley*, Noy. 121.

But an ejectment will not lie for a *tin bound*, which is a mere *easement, being nothing more than the liberty of entering and marking out certain bounds, within which the party has acquired a right to work a tin mine.(*a*)

When a grant of mines is so worded as not to operate as an actual demise, but only as a license to dig, search for, and take metals and minerals within a certain district during the term granted: it seems that a party claiming under such a grant, and who shall open and work and be in actual possession of any mines, may, if ousted, maintain ejectment in respect of them; but he cannot maintain ejectment either in respect of mines within the district, which he has not opened, or which, having opened, he has abandoned.(*b*)

An ejectment cannot be maintained against a person for setting up a stall in a public street, even assuming the freehold to belong to the parish.(*c*)

In the old cases it is holden, that an ejectment will not lie for a fishery, because, it is only a profit *apprender*;(*d*) but it is said by Ashhurst, J., in the case of *The King* v. *The Inhabitants of Old Arlesford*,(*e*)

[*21] "There is no doubt but that a fishery is a *tenement; trespass will lie for an injury to it, *and it may be recovered in ejectment.*"

But an ejectment will not lie for a water-course or rivulet, though its name be mentioned; because, it is impossibie to give execution of a thing which is transient, and always running. But if the ground over which the rivulet runs, belongs to the claimant, the rivulet may be recovered, by laying the action for "so many acres of land covered with †water,"(*g*)[1]. An ejectment may be maintained for a pool, or pit of water, because those words comprehend both land and water.(*h*)

(*a*) *Doe d. Earl of Falmouth* v. *Alderson*, 1 M. & W. 210.
(*b*) *Doe d. Hanley* v. *Wood*, 2 B. & A. 724; *Crocker* v. *Fothergill*, 2 B. & A. 652.
(*c*) *Doe d. Overseers of Poor, &c.*, v. *Cowley*, 1 C. & P. 123.
(*d*) *Molineaux* v. *Molineaux*, Cro. Jac. 144; *Herbert* v. *Laughlen*, Cro. Car. 492; *Waddy* v. *Newton*, 8 Mod. 275, 277.
(*e*) 1 T. R. 358.
(*g*) *Chancellor* v. *Thomas*, Yelv. 143.
(*h*) Ibid., Co. Litt. 5, (*b*.)

[1] Ejectment will lie for land which was below high water mark, in navigable waters and arms of the sea, where it has been filled up, and made hard land. *The People* v. *Maurau*, 5 Denio, 389.

The owner of the soil may maintain an ejectment for land, which is part of the king's highway; because, though the public have a right to pass over it, yet the freehold and all the profits belong to the owner.[1] But he must recover the land, and the sheriff give possession of it, subject to the public easement.(*a*)

(*a*) *Goodtitle d. Chester* v. *Alker*, Bur. 133, 145.

It will not lie for a mere privilege of a landing-place, held in common with other citizens of a town. *Black* v. *Hepburne*, 2 Yeates' Rep. 321.

The right of the riparian proprietor to land below high water mark, may be vindicated against a disseisor, in this action. *Nichols* v. *Lewis*, 15 Conn. Rep. 137.

If a grantor reserves to himself, his heirs, and assigns, forever, "the right and privilege of erecting a mill-dam at a certain place described, and to occupy and possess the said premises, without any hindrance or molestation from the grantee, or his heirs, &c.," he has such an interest in the land reserved as will support an ejectment. *Jackson ex dem. Loux et al.* v. *Buel*, 9 Johns. Rep. 298.

But the grant of a privilege to erect a machine and building on land, without defining the place where they are to be erected, or the quantity of ground which is to be occupied, does not, without an actual entry and location, confer such a right as to enable the lessee to maintain ejectment. *Jackson ex dem. Saxton* v. *May*, 16 Johns. Rep. 184.

Ejectment may be brought on a contract for the sale of a mill, though the contract embrace other matters connected therewith. *Carmalt* v. *Platt*, 7 Watts. 318; *Irvine* v. *Bull*, 7 Watts. 323.

[1] The owner of the soil may maintain an ejectment for land in which others possess an easement or right of way; for, the freehold still remains in him. *Cooper* v. *Smith*, 9 Serg. & Rawle Rep. 26.

When a highway is laid out over the land of a private person, the public acquires no more than a right of way, or easement, and the title of the original proprietor still continues: he may use the land in any manner not inconsistent with the public right; is entitled to all mines, &c., and may maintain trespass or ejectment, in relation to it. *Jackson ex dem. Yates et al.* v. *Hathaway*, 15 Johns. 447; and vide to the same purport, *Cortelyou* v. *Van Brundt*, 2 Johns. Rep. 357; *Whitebeck* v. *Cook et ux.*, 15 Johns. Rep. 491; *Babcock* v. *Lamb et al.*, 1 Cowen's Rep. 238; *Peck* v. *Smith*, 1 Conn. Rep. 130.

"It was once doubted whether ejectment, or other real action, would lie for the soil of a road or highway, because, it was said, full seisin could not be delivered; and a *dictum* of Lord Harwicke was quoted to that effect, in the case of *Goodtitle* v. *Alker et al.*, 1 Burr. 133; but that doubt was removed by the decision in that case; and very clearly it had no foundation in principle. And it was never doubted that the owner of the soil over which a highway was laid, could maintain trespass for an injury done to the soil." Per Wilde, J., delivering the opinion of the Court, 6 Pick. Rep. 59.

In the case of *Stackpole et al.* v. *Healy*, (16 Mass. Rep. 35,) Putman, J., delivering the opinion of the court, said, "The principal question intended to be presented in this case is, whether the people of this commonwealth have a right to use the lands for the purpose of grazing, which have been laid out as highways. I hold it to be clear, that the public have no other right but that of passing and repassing; and that the title to the land and all the profits to be derived from it, consistently with, and subject to, the right of way, remain in the owner of the soil. The owner may maintain trespass for any injury done to the soil,

An ejectment will lie *pro prima tonsura:* that is to say, if a man has a grant of the first grass that grows on the land every year, he may maintain ejectment against him who witholds it from him.(*a*) So also a demise of the hay-grass and after-math is sufficient to support an ejectment.(*b*) And the principle seems to be this, that the parties [*22] in these cases, *being entitled to all the profits of the land, for the time being, are entitled also for the same time to the land itself; and no man can enter thereon whilst they are so entitled, without being a trespasser. But the ejectment should not be brought for the land generally, but for the first grass or after-math thereof, as the case may be; although, where the demise was for so many acres of pasture land, it was held sufficient for the lessor of the plaintiff to show that he was entitled to the *prima tonsura* thereof, because the first grass being the most signal profit, the freehold of the land shall be esteemed to be in him who has it, until the contrary is shown.(*c*)

A right to the herbage will also be sufficient to support an *ejectment, because he who has a grant of the herbage has a particular interest in the soil, although by such grant the soil itself does not pass. But the ejectment should be for the herbage of the land, and not for the land itself.(*d*)

In like manner, an ejectment will lie for the pasture of a hundred sheep.(*e*)

(*a*) *Ward* v. *Petifer*, Cro. Car. 362.
(*b*) *Wheeler* v. *Toulson*, Hard. 330.
(*c*) *Rex* v. *Inhabitants of Stoke*, 2 T. R. 451.
(*d*) *Wheeler* v. *Toulson*, Hard. 330.
(*e*) Anon. 2 Dal. 95.

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which is not incidental to the right of passage acquired by the people. The land covered by a highway may be recovered in ejectment." And vide, to the same purport, *Alden* v. *Murdock*, 13 Mass. Rep. 256; *Perley* v. *Chandler*, 6 ib. 456; *Commonwealth* v. *Peters*, 2 ib. 127; *Chambers* v. *Furrys*, 1 Yeates' Rep. 167.

A public highway only vests in the commonwealth a right of passage, but the freehold and the profits, (such as trees upon it, and mines under it,) belong to the owner of the soil, who has a right to all remedies for the freehold, subject, however, to the easement. *Bolling* v. *The Mayor &c. of Petersburgh*, 3 Rand. Rep. 563.

But, in the case of *Doe ex dem. The Minister, &c., of the Parish of St. Julian* v. *Cowley*, (1 Carr. & P.'s Rep. 123,) tried at the Shrewsbury Assizes, before Mr. Baron Hullock, he held that ejectment cannot be brought against a person for setting up a stall in a street. The remedy is an action of trespass by the owner of the soil.

But a right to the pannage is not enough, because pannage is only the mast which falls from the trees, and not part of the soil itself.(*a*)

An ejectment will not lie for dower before assignment.(*b*)[1]

With respect to the manner in which *the premises should be [*23] described in an ejectment, no determined rule exists: nor is it easy to discover, from the adjudged cases, any principle which can guide us on the subject. It is very frequently said in general terms, that the description shall be *sufficiently certain;* but the degree of certainty required, particularly in the more ancient cases, seems to depend upon caprice rather than principle.[2] In the earlier stages of the remedy,

(*a*) *Pemble* v. *Sterne*, 1 Lev. 212, 3; S. C., 1 Sid. 416.
(*b*) *Doe d. Nutt* v. *Nutt*, 2 Car. & P. 430.

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[1] Ejectment does not lie by a widow to recover her interest in lands belonging to her husband, in his lifetime. *Bratton* v. *Mitchell*, 7 Watts. Rep. 113. Nor does it lie by the husband in his own name, to recover lands belonging to his wife. Ib.

It does not lie to enforce the support of a testator's widow, charged upon land devised to his son; nor if his son has alienated the land. *Craven* v. *Bleakney*, 9 Watts. Rep. 19.

It does not lie to enforce payment of rent, reserved on the ground rent in fee. *Henege* v. *Elliott*, 9 Watts. Rep. 258.

It may be brought by a married woman, for possession of a lot which has been set apart for her use as alimony, under a decree of divorce. *Lefevre* v. *Murdock*, Wright's Rep. 205.

[2] The plaintiff, in an action of ejectment, gave evidence that the tract of land, called in the patent Feltigraw's Fortune, was also known by the name of Felty's Fortune, as it was called in the declaration in the cause. Held sufficient, and that ejectment may be maintained for land by its reputed name. *Fouke et al.* v. *Kemp's Lessee*, 5 Harr. & Johns. Rep. 135.

A plaintiff must, in his declaration, describe truly the premises claimed, but is not bound to set forth the nature of the estate, nor the quantity of the interest claimed by him: and it was accordingly held, that a plaintiff was entitled to recover an undivided share, although in his declaration he claimed the whole of the premises. *Harrison* v. *Stevens*, 12 Wend. 170. *Van Alstyne* v. *Spraker*, 13 Wend. 578.

In an action for dower, the plaintiff is entitled to recover, although she claims in the declaration the third of an undivided half of a farm, and the proof is that she is entitled to the third of a half held in *severalty;* and after verdict she will be permitted to amend her declaration to make it conformable to the verdict. *Oothout* v. *Ledings*, 15 Wend. 410.

If the plaintiff in a declaration describe the land by courses and distances, without naming any monument except the point begun at, and without reference to any survey, or to the lines of the lot, he can only recover according to the direction of the magnetic needle, at the time when the action was brought. *Brooks* v. *Tyler*, 2 Verm. Rep 348.

A verdict "for the plaintiff for 150 acres, part of the land claimed in the writ and not guilty as to the residue," without designating the part found, is bad for uncertainty, and a judgment on it is erroneous. *Stewart* v. *Speer*, 5 Watt's Rep. 79.

when ejectments were compared to real actions, and arguments were drawn from analogy with them, a practice which obtained until after the reign of James I., much greater certainty was required than is now necessary: and it appears, that when the action was first invented, as much certainty was requisite as in a *præcipe quod reddat.*(a) The Courts, indeed, soon relaxed this severity, and allowed many descriptions to be sufficient in an ejectment, which would have been held too uncer-

(a) *Macdunoch* v. *Stafford*, 2 Roll. Rep. 166.

It is true, as a general principle, that the lines of a tract of land originally run by course and distance without calls, must be confined to the course and distance, and cannot be extended beyond them. *Giraud's Lessee* v. *Hughes*, 1 Gill & John. Rep. 249. *Rogers' Lessee* v. *Raborg*, 2 ib. 54. *Thomas* v. *Godfrey*, 3 ib. 142.

Plots in ejectment are part of the pleadings made to elucidate conflicting locations, and by which parties are notified of the precise grounds of adversary claims, and enabled to resist them. *Medley* v. *Williams*, 7 ib. 61.

If an ejectment is brought for land by the name of A., which is covered by another tract called B., to which the plaintiff makes title, can he recover? *Carroll et al. Lessees* v. *Norwood's Heirs*, 5 Harr. & Johns. Rep. 164.

The description of the *locus in quo* in the declaration of the plaintiff in ejectment, after describing its vicinity to other lands, proceeded thus: "the W. 1-2 of the N. W. 1-4; the S. E. 1-4; the E. 1-2 of the S. W. 1-4 of section number twenty-three; and the W. 1-2 of the N. W. 1-4 of section number twenty-six; township number eleven of range number one, west." Held, that this description was sufficient to uphold a verdict and judgment in favor of the plaintiff. *Pickett* v. *Doe*, 5 Smedes & Marsh. Rep. 470.

The Revised Statutes of New York, part 3, ch. 5, tit. 1, secs. 7, 8, 9, (vol. 2, p. 304,) contain the following provisions:—

"Sec. 7. It shall be sufficient for the plaintiff to aver, in his declaration, that on some day therein to be specified, and which shall be after his title accrued, he was possessed of the premises in question, describing them as hereinafter provided, and being so possessed thereof, that the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage, any nominal sum the plaintiff shall think proper to state."

"Sec. 8. In such declaration, the premises claimed shall be described with convenient certainty, designating the number of the lot, or township, if any, in which they shall be situated; if none, stating the names of the last occupants of lands adjoining the same, if any; if there be none, stating the natural boundaries, if any; and if none, describing such premises by metes and bounds; or in some other way, so that from such description possession of the premises claimed may be delivered."

"Sec. 9. If such plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in such declaration."

The Revised Statutes of Michigan and Wisconsin contain provisions similar to the foregoing. Rev. Sts. of Mich., tit. 23, ch. 108, secs. 7, 8, and 9; Rev. Sts. of Wis., ch. 106, secs. 7, 8 and 9.

The quantity of land is not essential to the description contained in the writ, if the land be sufficiently described. *Jones* v. *Porter*, 3 Penn. Rep. 132.

tain in a *præcipe;* as, for instance, an ejectment for a hop-yard was *held good; so also for an orchard, though in a *præcipe* it should be demanded as a garden(*a*); yet, notwithstanding this alteration, it was considered an established principle, until within the last century, that the description must be so certain as to enable the sheriff exactly to know, without any information from the lessor of the plaintiff, of what to deliver possession.(*b*)[1] Amongst other salutary regulations, however, which the wisdom of modern times has introduced into this action, the *abolition of this maxim may be reckoned: and [*24] it is now the practice for the sheriff to deliver possession of the premises recovered, according to the directions of the claimant, who therein acts at his own peril.(*c*)

Few cases are to be found in the modern books, wherein points respecting the certainty of description have arisen; and the authority of the old cases is very doubtful. The degree of certainty formerly required was much greater than is now necessary, and it is not improbable that many of the old decisions would be overruled, should they again come under the consideration of the Courts.(*d*)

Lands will be sufficiently described by the provincial terms of the counties in which they lie. Thus an ejectment may be maintained for "five acres of alder carr" in Norfolk:—alder carr, in that county, signifying land covered with alders. So also in Suffolk, for a beast gate; and in Yorkshire, for cattle gates.(*e*)

(*a*) *Wright* v. *Wheatley*, Noy. 37; S. C., Cro. Eliz. 854; *Royston* v. *Eccleston*, Cro. Jac. 654; S. C., Palm. 337.
(*b*) *Bindover* v. *Sindercome*, 2 Raym. 1470, and the cases there cited.
(*c*) *Cottingham* v. *King*, Burr. 623, 630; *Connor* v. *West*, Burr. 2672.
(*d*) *St. John* v. *Comyn*, Yelv. 117; *Cottingham* v. *King*, Burr. 623.
(*e*) *Barnes* v. *Peterson*, Stran. 1063; *Bennington* v. *Goodtitle*, ib. 1084.

[1] "The ancient rule required the description of the premises in the declaration to be so certain, that the sheriff might know, from his execution, exactly of what to deliver possession. The relaxation of that rule has opened the way to numerous and vexatious applications to correct the errors of the sheriff in delivering possession; and the settled rule of the Supreme Court, where a general verdict is given for the plaintiff, is to restrict him to the taking possession of so much only as he gave evidence of his title to on the trial." (Per Spencer, Senator,) *Seward* v. *Jackson ex dem. Van Wyck*, (in error,) 8 Cowen's Rep. 427.

There must be such a description of the land claimed in an action of ejectment as will enable the sheriff to deliver possession after judgment. *Fenwick* v *Floyd's Lessee*, 1 Har. & Gill's Rep. 172. *Clark* v. *Clark*, 7 Verm. Rep. 190. *Sawyer* v. *Fitts*, 4 Stewart & Porter's Rep. 365.

The same principle applies to ejectment in Ireland; and *terms used in that country will be sufficiently certain, when writs of error are brought therefrom in this kingdom. Thus an ejectment will [*25] lie in Ireland, for a township, for a kneave(*a*) or *quarter of land, or for so many acres of bog or of mountain :(*b*) the word mountain being, in that kingdom, rather a description of the quality, than the situation of the land.(*c*)

But an ejectment in England for a hundred acres of mountain, or a hundred acres of waste, has been held to be bad for uncertainty, because both waste and mountain comprehend in England many sorts of land.(*d*)

It is no objection to a description that the premises are twice demanded in the same demise.(*e*)

An ejectment will not lie for a tenement,[1] because many incorporeal hereditaments are included in that appellation,(*g*) and therefore the description is not certain enough; nor will an ejectment lie for a messuage, *or* tenement; for, the signification of the word tenement being more extensive than that of the word messuage, it is not sufficiently certain what is intended to be demanded in the ejectment.(*h*) It is also holden that an ejectment will not lie for a messuage *and* tenement.(*i*)[2]

(*a*) *Cottingham* v. *King*, Burr. 623, 30.

(*b*) *Barnes* v. *Peterson*, Stran. 1093; *Bennington* v. *Goodtitle*, ib. 1084.

(*c*) *Kildare* v. *Fisher*, Stran. 71, *vide cont.*; *Macdonnogh* v. *Stafford*, Palm. 100; S. C., 2 Roll. Rep. 189; *St. John* v. *Comyn*, Yelv. 117.

(*d*) *Hancock* v. *Price*, Hard. 57.

(*e*) *Warren* v. *Wakeley*, 2 Roll. Rep. 482.

(*g*) *Goodtitle* v. *Walton*, Stran. 834; *Copleston* v. *Piper*, Ld. Raym. 191.

(*h*) *Ashworth* v. *Stanley*, Styl. 364; *Wood* v. *Payne*, Cro. Eliz. 186; *Rochester* v. *Rickhouse*, Pop. 203.

(*i*) *Doe d. Bradshaw* v. *Plowman*, 1 East. 441, and the cases there cited.—In the case of

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[1] The word *tenement*, in a declaration, is sufficiently certain. *Den ex dem. Osborne* v. *Woodson*, 1 Hayw. Rep. 24.

[2] On error to reverse a judgment for the plaintiff in ejectment, which was brought for a messuage *and* tenement:

Per Curiam. "It is a settled rule that if the same count contains two demands or complaints, for one of which the action lies, and not for the other, all the damages shall be referred to the good cause of action, although it would be otherwise if they were in separate counts. That being so, there is no ground for reversing the judgment in question." Judgment affirmed. *Doe dem. Lawrie et al.* v. *Dyeball*, 8 Barn. & Cress. Rep. 70.

*But an ejectment for a messuage *or* tenement, with other words expressing its meaning, is good, as a messuage or tenement *called the Black Swan;* for the addition reduces it to the certainty of a dwelling-house.(*a*) [*26]

So also an ejectment for a messuage or burgage is good; because both signify the same thing in a borough.(*b*)

An ejectment for four corn-mills, without saying of what kind, whether wind-mills or water-mills, is good; for the precedents in the register are so.(*c*) [*27]

†An ejectment will lie for a stable and cottage,(*d*) and also for a house; though in a *præcipe* it ought to be demanded by the name of a messuage.(*e*)

Goodright d. Welch v. *Flood*, (3 Wils. 23,) in which a motion was made to arrest the judgment, because the plaintiff had declared of a messuage or tenement, the Court endeavored to get over the objection, and took time for consideration, but ultimately thought themselves bound by the adjudged cases, and reluctantly arrested the judgment. Afterwards, in *Doe d. Stewart* v. *Denton*, (1 T. R. 11,) on a similar application, where the plaintiff had declared for a messuage and tenement, the Court refused to grant the rule, Buller, J., saying, he remembered a case where a messuage or tenement had been held sufficiently certain. But this case was afterwards overruled, in *Doe d. Bradshaw* v. *Plowman*, (1 East, 441,) "for that it passed by surprise, and was not law, being contrary to adjudged cases." The point is, therefore, now at rest, although from the cases of *Goodtitle d. Wright* v. *Otway*, (3 East, 357,) and *Doe d. Laurie* v. *Dyball*, (1 M. & P. 330, and 8 B. & C. 70,) the defendant is precluded from deriving any advantage from such error in description. In the former case, the plaintiff had declared for a messuage and tenement, and the verdict was entered generally; but the Court permitted the lessor, (pending a rule *nisi* to arrest the judgment for the uncertainty,) to enter the verdict according to the Judge's notes for the messuage *only*, and that without releasing the damages. In the latter case, the declaration was for twenty messuages, twenty tenements, &c.; and the judgment being entered generally for the plaintiff, the defendant brought a writ of error in the King's Bench, pending which writ, the Court of Common Pleas allowed the record to be amended, by striking out the words, "twenty tenements;" and the Court of King's Bench, in the following Term, (the record I presume not having been amended,) gave judgment for the defendant in error on this ground, that if the same count contains two demands or complaints, for one of which only an action lies, all the damages shall be referred to the good cause of action, although *secus* if in separate counts.

(*a*) *Burbury* v. *Yeomans*, 1 Sid. 295.

(*b*) *Danvers* v. *Wellington*, Hard. 173; *Rochester* v. *Rickhouse*, Pop. 203.

(*c*) *Fitzgerald* v. *Marshal*, 1 Mod. 90.

(*d*) *Hill* v. *Giles*, Cro. Eliz. 818; *Lady Dacres' case*, 1 Lev. 58; *Hammond* v. *Ireland*, Sty. 215.

(*e*) *Royston* v. *Eccleston*, Cro. Jac. 654; S. C., Palm. 337.

Ejectment of a place called a passage room is certain enough.(*a*) So also of a room, and of a chamber in the second story.(*b*) In like manner it has been held that an ejectment for "part of a house in *A*." is sufficiently certain.(*c*) So also of "a certain place called the vestry."(*d*)

It has formerly been holden that an ejectment for a kitchen could not be supported; because, although the word be well enough understood in common parlance, yet, as any chamber in a house may be applied to that use, the sheriff has not certainty enough to direct him in the execution, and the kitchen may be changed between judgment and execution; but this reasoning does not correspond with the maxims of the present day.(*e*)

[*28] An ejectment will not lie for a close,(*g*) nor for the *third, or other part of a close, nor for a piece of land, unless the particular contents or number of acres be specified.(*h*) From the old authorities, it seems also formerly to be holden, (though the point is certainly somewhat obscure), that the addition of the name of the close, without mention of the *number of acres, would be bad; though such a description, it is conceived, would now be deemed sufficiently certain.(*i*)

In ejectment for land, the particular species should be mentioned in the description, whether *pasture*, *meadow*, &c., because land, in its legal acceptation, signifies only *arable* land.(*k*)

[*29] *An ejectment for ten acres of underwood has been held good;(*l*) because underwood is so well understood in law, that the sheriff has certainty enough to direct him in the execution.

(*a*) *Bindover* v. *Sindercombe*, Ld. Raym. 1470.

(*b*) Anon. 3 Leon. 210.

(*c*) *Sullivan* v. *Seagrave*, Stran. 695; *Rawson* v. *Maynard*, Cro. Eliz. 286.

(*d*) *Hutchinson* v. *Puller*, 3 Lev. 95.

(*e*) *Ford* v. *Lerke*, Noy. 109.

(*g*) *Savel's case*, 11 Co. 55; *Hammond* v. *Savel*, 1 Rol. Rep. 55; *Knight* v. *Syms*, Salk. 254; *Joans* v. *Hoel*, Cro. Eliz. 235.

(*h*) *Palmer's case*, Owen, 18; *Martyn* v. *Nichols*, Cro. Car. 573; *Jordan* v. *Cleabourne*, Cro. Eliz. 339; *Pemble* v. *Sterne*, 1 Lev. 213.

(*i*) *Lady Dacres' case*, 1 Lev. 58; *Savel's case*, 11 Co. 55; *Knight* v. *Syms*, 1 Salk. 254; *Royston* v. *Eccleston*, Cro. Jac. 654; *Jordan* v. *Cleabourne*, Cro. Eliz. 339; *Wykes* v. *Sparrow*, Cro. Jac. 435.

(*k*) *Massey* v. *Rice*, Cowp. 346, 349; *Savel's case*, 11 Co. 55.

(*l*) *Warren* v. *Wakeley*, 2 Roll. Rep. 482.

"Fifty acres of gorse and furze"(*a*) has been held sufficiently certain in an ejectment, without specifying the particular quantity of each: so also "fifty acres of furze and heath," and "fifty acres of moor and marsh."(*b*)

An ejectment for "ten acres of pease" has been held to be certain enough, as signifying the same with ten acres of land covered with pease.(*c*)

It seems that an ejectment may be brought for a manor, or a moiety of a manor, generally, without any description of the number of acres, or species of land contained therein, and that under such general description the jury may find the verdict for the plaintiff, for a messuage, or for so many acres "parcel of the said manor,"[1] and for the defendant, for the residue of the *manor; but it is said in the old cases, not to be safe to bring an ejectment for a manor without describing the quantity and species of the land.(*d*)

When an ejectment is brought for tithes,(*e*) the particular species of tithe demanded should be specified in the declaration, as of hay, wheat, &c., or the description will be bad for uncertainty;(*g*) but it is not also necessary to mention the precise quantity of each species, because tithe is in its nature uncertain, the quantity entirely depending on the fruitfulness of the season, and it is therefore enough to say, "of certain tithes of hay, wool, &c."(*h*)

*In an old case, where the plaintiff declared on a lease for [*30] tithes in R. belonging to the rectory of D., and that the de-

(*a*) *Fitzgerald* v. *Marshall*, 1 Mod. 90.

(*b*) *Connor* v. *West*, Burr. 2672.

(*c*) *Odingsall* v. *Jackson*, 1 Brown, 149.

(*d*) *Warden's case*, Het. 146; *Cole* v. *Aylott*, Litt. Rep. 299, 301; *Hems* v. *Stroud*, Latch. 61.

(*e*) It was once contended, that in an ejectment for tithes, the ejectment should be laid, "of the rectory, or chapel, and of the tithes thereunto appertaining," for that the plaintiff could not have a writ of *habere facias possessionem* of the tithes only; but the objection was overruled; *Baldwin* v. *Wine*, Cro. Car. 301.

(*g*) *Harpur's case*, 11 Co. 25(*b*); *Worrall* v. *Harper*, 1 Roll. Rep. 65, 68; Dyer, 84, 5.

(*h*) Anon., Dyer, 116,(*b*).

[1] A declaration in ejectment claiming 251 acres, part of a tract of land called, &c., without any description of the part claimed, and a writ of possession in conformity, are both defective. *Fenwick* v. *Floyd's Lessee*, 1 Har & Gill's Rep. 172.

fendant entered upon him, and took *such* tithes severed from the nine parts in R., without saying that the tithes so taken belonged to the rectory of D., the description was held ill, because it did not confine the ouster to the tithes laid in the declaration; for the defendant might have ousted the plaintiff of the tithes in R., which did not belong to the rectory of D.(*a*)

In an ejectment brought in the county of Durham, the plaintiff declared "for coal mines in Gateside" generally, not specifying the particular number; and it appearing upon a *writ of error, that such was the customary mode of declaring in the county, the judgment for the plaintiff was affirmed.(*b*)

If a person eject another from land, and build thereon, it is sufficient if the owner bring his ejectment for the land, without mentioning the building, except where the building is a messuage, and then perhaps it ought to be particularly named.(*c*)

(*a*) *Baldwin* v. *Wine*, W. Jones, 321, *tamen quære, et vide, Goodright d. Smallwood* v. *Strother*, Bik. 706.

(*b*) *Whittingham* v. *Andrews*, 4 Mod. 143; S. C., 1 Show. 364; S. C., Salk. 255; S. C., Carth. 277; S. C., Comb. 201.

(*c*) *Goodtitle d. Chester* v. *Alker*, Burr. 133, 144.

*CHAPTER III.

Of the title necessary to support the action of ejectment.

It is a maxim of our law that the party in possession of property is considered to be the owner, until the contrary is proved.(*a*) It is necessary, therefore, for a claimant in ejectment to show in himself a good and sufficient title to the disputed lands. He will not be assisted by the weakness of the defendant's claim, for the possession of the latter gives him a right against every man who cannot establish a title; and if he can answer the case on the part of the claimant, by showing the real title to be in another, it will be sufficient for his defence, (excepting of course those cases in which the defendant is estopped from disputing the claimant's title,) although he does not pretend that he holds the lands with the consent, or under the authority of the real owner.(*b*)[1]

(*a*) *Doe d. Hughes* v. *Dyball*, 1 M. & M. 346.
(*b*) *Roe d. Haldane* v. *Harvey*, 4 Burr. 2484; *Doe d. Crisp* v. *Barber*, 2 T. R. 749.

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[1] The plaintiff in ejectment, must recover on the strength of his own title, and not on the weakness of his adversary's. *Eldon* v. *Doe*, 6 Blackf. Rep. 341; *Huddleston* v. *Garrett*, 3 Humph. 629; *Winn* v. *Cole*, Walker's Rep. 119.

The plaintiff in ejectment must show a complete title, and identify the land in accordance therewith; and where the court instructed the jury that, in the absence of any proof of title to the land in controversy, on the part of the defendant, he had no right to complain of any adjustment between the lessor of the plaintiff and the person through whom the lessor of the plaintiff claimed as to the particular land the vendee of the lessor designed conveying, and that the land he designed conveying was in fact that which was actually conveyed, it was held erroneous. *McRaven* v. *McGuire*, 9 Smede's & Marsh. Rep. 34.

A judgment for the plaintiff in ejectment, generally terminates all presumption in favor of the defendant's title, arising from prior possession. *Jackson ex dem. Hills* v. *Tuttle*, 9 Cow. Rep. 233.

Possession of land by a party claiming it as his own in fee, is *prima facie* evidence of his ownership and seisin of the inheritance. *Ricard* v. *Williams et al.*, 7 Wheat. Rep. 59.

But possession alone, unexplained by collateral circumstances, evidences no more than the mere fact of present occupation by right; the law will not presume a wrong, and a mere possession is just as consistent with a present interest under a lease for years or for life as in fee. It must depend on the collateral circumstances what is the quality and extent of the interest claimed by the party: and to that extent only will the presumption of law go in his favor. The declarations of the party while in possession, equally with his acts, must be good evidence for this purpose. If he claims only an estate for life, and that

is consistent with his possession. the law will not, upon the mere fact of his possession, adjudge him to be in under a higher right or a larger estate. *Ricard* v. *Williams et al.*, 7 Wheat. Rep. 105, 106.

If a party be in under title, and, by mistake of law, supposes himself possessed of a less estate in the lands than really belongs to him, the law will adjudge him in possession of, and remit him to his full right and title. For a mistake of law shall not in such case prejudice the right of the party, and his possession therefore must be held co-extensive with his right. *Ricard* v. *Williams et al.*, 7 Wheat. Rep. 106.

Possession ought not to be ousted without a clear title in the plaintiff, especially where it has been upheld by the state tribunals. *Preston's Heirs* v. *Bowmar*, 6 Wheat. Rep. 580.

Where there is an ambiguity in the title under which the plaintiff in ejectment claims, it ought not to receive the broadest construction against a party in actual possession under a legal title. *Preston's Heirs* v. *Bowmar*, 5 Wheat. 582.

Actual possession is *prima facie* evidence of a legal title. *Jackson ex dem. Stewart* v. *Town*, 4 Cow. Rep. 602.

In ejectment, possession, accompanied with a claim of ownership in fee, is *prima facie* evidence of such an estate. In such case it is not the possession alone, but that it is accompanied with the claim of the fee. which gives this effect by construction of law to the acts of the parties. *Jackson ex dem. Sparkman* v. *Porter*, 1 Paine's Rep. 457.

But such effect is limited to the claim actually made, and a claim of a different kind cannot afterwards be set up for the purpose of aiding the first. Ibid.

As where one claimed a title by an Indian deed, confirmed by an agent of the British government, who could not lawfully have confirmed it: it was held that no other deed, and no other kind of confirmatian could be set up to help the possession, and that any presumption of the existence of a deed was to be confined to such a one as was originally asserted. Ib.

Where A. owned a patent, and B. owned another patent, adjoining, and in the location under their respective patents, A., by a mistake in locating, curtailed his patent on the side of B., in consequence of which, B., though he located, at first, on the true line, afterwards claimed up to A.'s location, and deeded a supposed gore between the patents; *held*, that A. was not concluded in action of ejectment, but might recover against one claiming a part of the supposed gore under the title of B. *Jackson ex dem. Gilliland et al.* v. *Woodruff et al.*, 1 Cow. Rep. 276.

And though A. actually give conveyances of his land, according to such mistaken location, he will not be concluded in relation to any persons other than those to whom he has thus conveyed. Ibid.

An acquiescence for a period of five years in a boundary line between two adjoining lots in a village or city, where there was no express agreement settling the line, and where the parties evidently acted under a mistake as to the true location, will not bar the party whose lot has been encroached upon from maintaining an action of ejectment, although the other party has erected a valuable building extending beyond his lot to the erroneous line. *Kipp* v. *Norton*, 12 Wen. 127.

But after twelve years acquiescence, a party who has aided in the survey, conformably to which the location is made, is bound by it; and to bind him, it is not necessary to show that with a full knowledge of the mistake, he expressly agreed to abide by the location. *Jackson* v. *M'Connell*, 12 Wen. 421.

Long acquiescence in an erroneous location will authorize a jury to find that the plaintiff had agreed to a location different from that given by his deed; and whether the plaintiff knew his rights or not, such location or acquiescence will conclude him. *Dibble* v. *Rogers*, 13 Wen. 536; *Rockwell* v. *Adams*, 6 Wen. 467; *M'Cormick* v. *Barnum*, 10 Wen. 104; reversed, see *Adams* v. *Rockwell*, 16 Wen. 285.

The declarations, as well as the acts of parties, are competent evidence upon the question of location. Ibid.

The reversal in this case was on the ground of the too general application of the doctrine of acquiescence. The lands disputed were in a state of nature, and there was no other occupation of them than the occasional cutting down of trees and drawing away of timber.

The question of acquiescence arising from the maintenance of a division fence, and occupation in conformity to it, cannot be determined by the judge; but must be submitted to the jury under such instructions, as to the law of the case, as the judge thinks proper to give. *Bradstreet* v. *Pratt*, 17 Wen. 44.

A feme covert is not bound by the acquiescence of her husband in an erroneous line, dividing lands owned by her from adjoining lands. Ibid.

The rule is not invariable, that a *crooked fence* will be regarded as a boundary fixed and acquiesced in by the owners of adjoining lands, although it has been continued for thirty years. *Lamb* v. *Coe*, 15 Wen. 642.

In a dispute relative to the true line between adjoining tracts, the fact that the owner of one of them directed his agent not to sell any lands within the disputed lines, and omitted to pay taxes due on the disputed lands, are not such evidence of acquiescence as will conclude him from subsequently asserting his right to the land. *Van Wyck* v. *Wright*, 18 Wen. 158.

The doctrine of acquiescence as laid down in *Adams* v. *Rockwell*, 16 Wen. 285, reiterated and confirmed. Ib.

If A. convey to B., and afterwards convey or release the same land to C., who is in possession, and an action of ejectment is brought against C. on the demise of A., and B. the plaintiff cannot recover on the demise of A., who is estopped by the subsequent deed to C.; and if the deed to B. were void, by reason of an adverse possession, he must also fail on that demise. *Jackson ex dem. Lathrop et al.* v. *Demont*, 9 Johns. Rep. 55. Same point, *Jackson ex dem. Bonnell* v. *Wheeler*, 10 Johns. Rep. 164.

A patent for unimproved lands, no part of which was in the possession of any one at the time it issued, gives legal seisin and constructive possession of all the land within the survey. *Peyton* v. *Stith*, 5 Peter's Rep. 485.

As between the holders of general or common land-warrants, there is no priority of right to locate; this warrant is a mere authority to the proper officer to make the survey; and the certificate is the inception of title, to which the patent, when issued, relates. *Canal Co.* v. *Railroad Co.*, 4 Gill & Johns. Rep. 1.

Where a plaintiff relies on a documentary proof of title, a complete title must be shown; and if a material link be wanting, his documentary proof should be excluded from the jury. *Jinkins* v. *Noel*, 3 Stewart's Rep. 60.

It is not indispensable that the plaintiff should show a perfect indefeasable estate in *fee simple*, to authorize a recovery against one who can establish no legal right either of property or possession. *Lewis* v. *Goguette*, 3 Stewart and Porter's Rep. 184.

The plaintiff in ejectment relied on a judgment in partition only, and that being void, it was held, that he could not recover, in such case, his undivided share, without deducing a regular title, as if no such judgment of partition had been entered. *Jackson ex dem. Antell et ux.* v. *Brown*, 3 Johns. Rep. 459.

Where the plaintiff, in an action of ejectment, commenced in 1809, showed title by a release, made in 1767 in partition, to eighteen-twentieths of the premises in question, and proved by witnesses, that all the lots in the patent so divided, with which they were acquainted, were held agreeably to that partition, and no outstanding title in the two remaining patentees appearing; *held*, that it might legally be inferred that the lessor had a perfect title to the whole. *Doe ex dem. Clinton et al.* v. *Campbell*, 10 Johns. Rep. 475.

Where, by an act of the legislature passed 6th of April, 1792, the Surveyor-General was anthorized to sell such lands of W. as C. should discover to have become forfeited by the attainder of W., under the act of October, 1779, and pay the money arising from such sale to the treasurer, &c., out of which the treasurer was to pay the demand of C. against W.; and the Surveyor-General sold all the estate of W. in a certain lot of land; in an action of ejectment by a person under the deed of the Surveyor-General; it was held, that the act of the legislature, and the deed of the Surveyor-General, were *prima facie* evidence of title sufficient to enable the plaintiff to recover. *Jackson ex dem. Wickham* v. *Belknap*, 12 Johns. Rep. 96.

A title derived from the grant of a foreign government is void. *Jackson ex dem. Winthrop* v. *Waters*, 12 Johns. Rep. 365.

In an action of ejectment by a purchaser under a sheriff's sale on execution, to recover the possession of the land, the plaintiff must produce not only the sheriff's deed and the execution, but an exemplification of the judgment in which the execution issued. *Jackson ex dem. Sleight* v. *Hasbrouck*, 12 Johns. Rep. 213.

A *fine* and five year's non-claim are conclusive evidence of title in the cognizee against all persons not under any legal disability; and a fine alone is sufficient to support an action of ejectment against a person who has entered, during the five years, without a title. *Jackson ex dem. Watson* v. *Smith*, 13 Johns. Rep. 426.

Where several persons are devisees and tenants in common of land which is sold by two of the executors and devisees, under a power in the will of the devisor, and afterwards one of the executors and devisees, who made the sale, purchases from the grantee, and takes a conveyance of the lands to himself, absolutely, the title becomes vested in him, solely: and his declarations that he held in common with his co-devisees are sufficient to entitle them to recover a portion of the land, as tenants in common with him. *Jackson ex dem. King* v. *Burtiss et al.*, 14 Johns. Rep. 391.

A purchaser, at a sheriff's sale, of all the right and title of a mortgagor in possession, is entitled to recover in ejectment against the mortgagor, though the mortgagee was made a co-defendant, and the mortgage was outstanding. *Jackson ex dem. Randall* v. *Davies*, 18 Johns. Rep. 7.

Though the exemplification of the record of the judgment stated that it was filed and docketed on the 22d of May; and the execution directed the sheriff to levy on lands of which the defendant was seised on the 2d of May; and the clerk of the Court certified that there was a mistake in the exemplification; and that the record was in fact filed on the 2d of May; held, that the error in the exemplification produced at the trial was not sufficient to affect or defeat the plaintiff's title. Ib.

C., who derived his title from E., of a lot of ground of sixty acres, mortgaged the whole to E., who afterwards sold and conveyed six acres, part of the lot, in fee to B.; held, that C., the mortgagor, might maintain ejectment against B., the grantee of the mortgagee. *Jackson ex dem. Curtiss* v. *Bronson*, 19 Johns. Rep. 325.

To warrant one's being made a lessor in ejectment, he must have a claim to a subsisting title, or interest in the premises. *Jackson ex dem. Colden et al* v. *Paul*, 2 Cow. Rep. 502.

It is not enough that it may be a question on the trial, whether the legal title is not vested in him. Ib.

A defendant in ejectment, having shown no title, cannot take exceptions to imperfections in the plaintiff's title. *M'Allister* v. *Williams*, 1 Tenn. Rep. 107.

A mere possessor, sued in ejectment, will not be permitted to go into proof, showing that a *mesne* conveyance, under which the plaintiff claims, was forged, the conveyance having been proved and recorded. *Waterhouse* v. *White*, 2 Tenn. Rep. 334.

If the lessor had no title to enable him to make the lease, or if he have parted with his

title, though to the lessee himself, the action cannot be supported. *Bates ex dem. Shattuck* v. *Tucker*, Chipman's Rep. 73.

In ejectment, the plaintiff, in deducing his title, must show a grant of the land, and a regular title from the grantee, or seisin of the land, for which the ejectment was brought, and a dying seised of the person under whom the lessor of the plaintiff derived his title, and a regular title from the person dying seised, or twenty years' uninterrupted and exclusive possession of the land. *Plumer et al.* v. *Lane et al.*, 4 Har. & M'Hen. 72.

Sec. 3. "No person can recover in ejectment, unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or some share, interest, or portion thereof, to be proved and established at the trial." Rev. Sts. of N. Y., part. 3, ch. 5, tit. 1, sec. 3, (vol. 2. p. 303.)

In Pennsylvania, if the plaintiff's title is founded upon a warrant only, without survey or purchase-money paid, it is insufficient to entitle him to recover. *Lessee of Vanhorn* v. *Chesnut*, 2 Wash. C. C. Rep. 166.

Payment of part of the purchase-money for land, a survey, and taking possession, clearing, and building a house, by the purchaser, give a title though the contract be by parol. *Smith* v. *Lessee of Patton*, 1 Serg. & Rawl. Rep. 80.

It is a general rule, that where a contract has been made for the purchase of land, the purchaser shall not recover possession till he has paid or tendered the purchase-money. Ibid.

Quære, whether this must be done previous to the commencement of the ejectment. Ib.

If the vendor be the executor of the vendee, and retain effects equivalent to the purchase-money, such tender or payment need not be made. Ibid.

If the plaintiff in ejectment have not a regular paper title, it is sufficient if he show a *right of entry*. *Lessee of Milligan* v. *Dickson*, 1 Peter's C. C. Rep. 435, (in note.)

In ejectment against any other than the proprietary or one claiming under him, it is not necessary for the plaintiff to show the title out of the proprietary, if a right of entry is proved. *Hilton's Lessee* v. *Brown*, 1 Wash. C. C. Rep. 204.

In order to recover in ejectment, the plaintiff must prove, first, that he had title at the time of the demise laid; and, secondly, that the defendant was in possession at the time the suit was brought. *Bailey et al.* v. *Fairplay, Lessee, &c.*, 6 Binn. Rep. 454.

An agreement by the lessor of the plaintiff for the sale and conveyance of the land to the defendant, cannot be given in evidence in a trial at law in the circuit court, as it is at most only evidence of an equitable title. *Lessee of Willink* v. *Miles*, 1 Peter's Circ. Ct. Rep. 429; see *Maynard's Lessee* v *Cable*, Wright's Ohio Rep. 18.

An outstanding title must be a present, subsisting and operative one; otherwise the presumption will be, that it has become extinguished. *Jackson ex dem. Klock* v. *Hudson*, 3 Johns. Rep. 375; same point, *Jackson ex dem. Dunbar et al.* v. *Todd*, 6 Johns. Rep. 257; *Greenleaf's Lessee* v. *Birth*, 6 Peter's Rep. 302; *Peck* v. *Carmichael*, 9 Yerger's Rep. 325.

Where the plaintiff had shown a title, which would have entitled him to a verdict, unless that of the defendant were better, it was error in the court below to instruct the jury that they were not called upon to decide the validity of the defendant's title; but that of the plaintiff alone. *Jack* v. *Dougherty*, 3 Watt's Rep. 151.

If the stranger's right of entry is tolled by an adverse possession, no matter by whom, the reason fails; and the defendant cannot then use the stranger's title as a defence. *Griffith* v. *Dicken*, 4 Dana's Rep. 562.

Where the plaintiff claims a part of the premises, as tenant in common with the defendant, the latter not being a mere trespasser, can show that a stranger has better title to the portion claimed. *Jones* v. *Perkins*, 1 Stewart's Rep. 512.

A defendant in an action of ejectment, cannot set up an outstanding mortgage in the hands of a stranger, to defeat the title of the mortgagor or his heirs. *Den ex dem. Dimon* v. *Dimon*, 5 Halst. Rep. 156.

A mortgagor will not be permitted to dispute a title derived under his mortgage, nor to allege anything in opposition to a claim founded on it. Nor can he set up an outstanding title in another, for the purpose of defeating a recovery in an action of ejectment upon the mortgage. *Den ex dem. Burhans* v. *Vanness*, 5 Halst. Rep. 102.

Though the lessor of the plaintiff, as the assignee of the mortgagee, and as purchaser of the equity of redemption, unite both the legal and equitable claim in himself, no such merger will be thereby produced as to prevent him from maintaining ejectment against the mortgagor. *Den ex dem. Burhans* v. *Vanness*, 5 Halst. Rep. 102.

And if the plaintiff show a good title, the presumption of the extinguishment of the outstanding title ought to be liberally indulged. *Jackson ex dem. Klock* v. *Hudson*, 3 Johns. Rep. 381.

Though the defendant *forcibly* entered and took possession, he is not precluded from setting up a title in himself, or a third person, in bar of the action. (Per Spencer, Ch. J.) *Jackson ex dem. Seeley* v. *Morse*, 16 Johns. Rep. 200.

A defendant in ejectment may defend himself by showing an elder outstanding patent for the land, than that under which the plaintiff claims. *Colston* v. *M'Kay*, 1 Marsh Rep. (Ky.) 251.

Where upwards of twenty years of adverse possession have run against an outstanding title, it cannot be set up as a bar, for the presumption is, that it is no longer a subsisting title. *Jackson ex dem. Duncan et al.* v. *Harder*, 4 Johns. Rep. 202.

A claim or title which could not be set up by a person while in possession, cannot be set up by another person who comes into possession under him. *Jackson ex dem. Duncan et al.* v. *Harder*, 4 Johns. Rep. 202.

A mere trespasser shall not be permitted to show a title in a third person in opposition to the title of the plaintiff in ejectment; and where the defendant is permitted to set up a title in a third person, the plaintiff, having first shown a *prima facie* good title in himself at the time of bringing the action, may show that, since issue joined, he has procured the title of such third person. *Perryman's Lessee* v. *Callison*, 1 Tenn. Rep. 515.

A mere trespasser or intruder cannot protect himself by setting up an outstanding title in a stranger. *Jackson ex dem. Duncan et al.* v. *Harder*, 4 Johns. Rep. 202.

A wrong doer or disseisor may recover in an action of ejectment, against a subsequent intruder, without an actual adverse possession of twenty-one years. *Hoey* v. *Furman*, 1 Penn. State Rep. 295.

A deed from the lessor of the plaintiff, made after the suit is brought, is inadmissible to defeat the plaintiff's recovery. *Lessee of Dawson* v. *Porter*, Ohio Con. Rep. 271.

A mere intruder cannot question the validity of a patent under which the plaintiff claims. *Lessee of Holt's heirs* v. *Hemphill's heirs*, ib. 551.

A., in 1770, being indebted to B., by three several bonds, executed a mortgage including the premises in question, and covenanted that on default, the mortgagee, his heirs, &c., might enter; in 1771, the mortgage had become forfeited, and a judgment had also been recovered by B. against A., which was revived in 1775 and in 1778, under which the premises in question were sold to C., (who also derived title from the heirs and devisees of B.,) from whom the defendant claimed title, but the validity of the sheriff's deed was questionable; in an action of ejectment by persons claiming under B.; held, that although the mortgage was forfeited as long ago as 1771, it was still outstanding, the presumption of payment being rebutted by the proceedings had to revive the judgment, (which judgment had been revived on two of the bonds recited in the mortgage,) and the sale under the execution,

notwithstanding the proceedings and sale, might have been defective, and that from 1771 to 1790, when C. took possession, after deducting the period of the revolutionary war, there had not been sufficient time on which to found a presumpiton; and that consequently the mortgage was a good outstanding title, and sufficient to protect the defendant's possession, independant of the sheriff's deed. *Jackson ex dem. Livingston et al.* v. *Delancey et al.*, 11 Johns. Rep. 365.

A satisfied mortgage, though paid off by the defendant, is not a bar in ejectment. *Jackson ex dem. Watson* v. *Cris*, 11 Johns. Rep. 437.

An outstanding title in a person other than the lessor of the plaintiff in ejectment, is sufficient to defeat his recovery, though the defendant do not claim under that title. *Jackson ex dem. Loop et al.* v. *Harrington*, 9 Cowen's Rep. 86. *Williams* v. *Seawell*, 1 Yerger's Rep. 83.

And this, it seems, though the title be outstanding in the trustee of the lessor. *Jackson ex dem. Loop et al.* v. *Harrington*, 9 Cowen's Rep. 86.

A mortgage before foreclosure or entry is not a legal title which a stranger can set up. *Collins* v. *Torrey*, 7 Johns. Rep. 278. *Jackson ex dem. Martin* v. *Pratt*, 10 Johns. Rep. 387.

It can only be used by the mortgagee and his representatives. *Collins* v. *Torrey*, 7 Johns. Rep. 282.

When the mortgagee has never entered, and there has been no foreclosure, and interest has not been paid within twenty years, a mortgage is not a subsisting title. *Collins* v. *Torrey*, 7 Johns. Rep. 278. Same point, *Jackson ex dem. Klock* v. *Hudson*, 3 Johns. Rep. 381. (Per Kent, Ch. J., delivering the opinion of the court.)

But the assignee of a mortgage in possession is protected by the mortgage, though no foreclosure of it is shown. *Jackson ex dem. Minkler* v. *Minkler et al.*, 10 Johns. Rep. 480.

Where no possession had been taken under a mortgage, nor any interest paid, nor steps taken to enforce it for nineteen years: held not to be a subsisting outstanding title, and that a jury might presume it satisfied. *Jackson ex dem. Martin* v. *Pratt*, 10 Johns. Rep. 381.

In the case of *Jackson ex dem. Dox* v. *Jackson*, (5 Cow. Rep. 174,) Sutherland, J., in delivering the opinion of the court, said:

"But it is perfectly immaterial whether Jackson, the mortgagor, was dead or alive. The defendant professed to derive all his title from him. He supposed him dead, and therefore claimed as his heir. But if he was alive, then the defendant was merely his tenant. In neither case could his possession be adverse to that of Jackson, or his mortgagee." *Et vide Higginson* v. *Mein*, 4 Cranch's Rep. 419.

Where premises were mortgaged in fee, with a proviso for conveyance, if the principal were paid on a given day, and in the meantime that the mortgagor should continue in possession; upon special verdict, it was found that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury either that interest had or had not been paid by the mortgagor: held, that upon this finding, it must be taken, that the occupation was by the permission of the mortgagee; and consequently, that although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations: held also, that an entry is not necessary to avoid a fine levied by the mortgagor. *Hall* v. *Doe ex dem. Surtees et al.*, 5 Barn. & Ald. Rep. 687.

But where a *bona fide* purchaser from a mortgagor entered, without notice of the mortgage, (which was not registered till after the commencement of the ejectment suit,) and he and those claiming under him, had "been in the continued possession of the premises under a color of title for more than seven years," it was held a sufficient adverse possession to bar the mortgagee, or any claiming under him, from recovering in ejectment. *Baker* v. *Evans*, 2 N. Car. Law Repos. 614, 616.

Neither a mortgagor nor his assignee can hold adverse possession to the mortgagee, unless the assignee has taken a conveyance without notice, otherwise they are mere tenants at will. *Newman* v. *Chapman*, 3 Rand, Rep. 93.

When a person who had a mortgage of lands, was afterwards attainted; held, that the mortgage might be set up against the people, as having succeeded to the rights of the mortgagor. *Jackson ex dem. People* v. *Pierce*, 10 Johns. Rep. 414.

But if the defendant have acknowledged the title of the plaintiff, he cannot afterwards dispute it. *Jackson ex dem. Low* v. *Reynolds*, 1 Caines' Rep. 444. *Jackson ex dem. Smith et al.* v. *Stewart*, 6 Johns. Rep. 34. *Jackson ex dem. Davy* v. *De Walts*, 7 Johns. Rep. 157. *Jackson ex dem. Bowne* v. *Hinman*, 19 Johns. Rep. 202.

And even where the predecessors of the defendant had acknowledged the title of the claimant, it was held that the defendant was equally precluded from setting up the defence of adverse possession. *Jackson ex dem. Van Schaick and others* v. *Davis*, 5 Cow. Rep. 129, 130.

And to the same purport, vide *Jackson ex dem. Griswold et al.* v. *Bard*, 4 Johns. Rep. 230. *Brandter ex dem. Fitch* v. *Marshall*, 1 Caines' Rep. 394. *Rowletts* v. *Daniel*, 4 Munf. Rep. 473.

A possession of land, taken under an executory contract for the purchase thereof, is in no sense adverse to the person with whom the contract is made. *Jackson ex dem. Swartwout et ux.* v. *Johnson*, 5 Cow. Rep. 74. *Jackson ex dem. Young et al.* v. *Camp*, 1 Cow Rep. 610. *Botts et al.* v. *Shield's Heirs*, 3 Litt. Rep. 34. *Morris* v. *Thomas*, 5 Binn. Rep. 77. *The Proprietors of township number Six* v. *M'Farland*, 12 Mass. Rep. 325. *Higginbottom et al.* v. *Fishback*, 1 Marsh. Rep. (Ky.) 325, 506. *Wilkinson, &c.* v. *Nichols*, Monr. Rep. 36. *Richardson et al.* v. *Broughton*, 2 Nott & M'Cord's Rep. 417. *Jackson ex dem. Griswold et al.* v. *Bard*, 4 Johns. Rep. 230. *Bowker* v. *Walker*, 1 Verm. Rep. 18.

Where one takes by descent as a co-heir and tenant in common, he cannot show (in ejectment by his co-heir, or one claiming under him,) that the ancestor had no title. *Jackson ex dem. Hill* v. *Streeter*, 5 Cow. Rep. 529.

In the case of *Pender* v. *Jones*, (2 Hayw. Rep. 294,) Taylor, J., said, "I am of opinion, that a deliberate avowal on the part of the possessor, of title in the claimant, or a serious assent to the validity of his title, will render any entry or claim unnecessary, and is equivalent in its effects to an entry or claim."

But where the lessors proved no seisin or title in themselves, and relied upon proof of an agreement by the persons in possession to take a lease from them, but there was no proof that any lease was ever executed or any rent paid, and the defendant claimed to hold adversely, and showed a title in third persons, the Court, after stating these facts, added, "It does not appear that the defendant was put into possession by the lessors, or that he ever paid them any rent. The defendant must have judgment." *Jackson ex dem. Southampton et al.* v. *Cooley*, 2 Johns. Cas. 223.

And where A., in the year 1779, as a tenant of B., and by his directions, entered into the premises in question and took possession, which was regularly continued down to the defendant; and B. at the time wrote to C., (who also claimed the premises as lying on his, C.'s side of the division line,) that he (C.) was mistaken in supposing the land to be his own; but that, when the times became more peaceable, he, B., and C. would have the land surveyed, and if the land did belong to C., then A. should pay rent, &c. It was held, that this letter merely suspended the operation of the statute of limitation during the war; and that, there having been more than twenty years adverse possession under B.'s title since 1783, C. could not recover. *Jackson ex dem. Brott et al.* v. *Hunt*, 6 Johns. Rep. 16.

The defendant went into possession of land under Gansevoort, whom he supposed to be the owner of the soil; but afterwards believing that Mrs. Clark was the owner, he applied

to her to purchase the land; after that application, Mrs. Clark conveyed the premises to Viely, who, before bringing suit, ordered the defendant to leave the premises. *Held*, that the defendant *could not set up an adverse possession of twenty years;* though he might show that he made the application under a mistake, and prove a title out of the lessors of the plaintiff. *Jackson ex dem. Viely and Clark* v. *Cuerden*, 2 Johns. Cas. 353.

"The repeated acts of the defendant, recognizing the plaintiff's title by application to purchase from him, both before and after he entered into possession of the premises, afforded the strongest reason to presume that the defendant was in possession under David Russell (one of the lessors of the plaintiff.) We are accordingly of opinion that the plaintiff ought to have judgment." *Jackson ex dem. d. Russell et al.* v. *Croy*, 12 Johns. Rep. 430. (Per Yates, J., delivering the opinion of the court,) and vide *Jackson ex dem. Brown et al.* v. *Ayres*, 14 Johns. Rep. 224.

Where an acknowledgment of tenancy on the part of the defendant in ejectment has been proved, he will not be allowed to give evidence to contradict or disprove the title of his landlord. *Jackson ex dem. Van Alen* v. *Vosburgh*, 7 Johns. Rep. 186. *Jackson ex dem. Van Shaick et al.* v. *Davis*, 5 Cow. Rep. 129, 130. *Lessee of Galloway* v. *Ogle*, 2 Binney's Rep. 472. *Graham et al.* v. *Moore et al.*, 4 Serg. & R. Rep. 467. *Brandter ex dem. Fitch* v. *Marshall*, 1 Caines' Rep. 401. *Jackson ex dem. Webber et al.* v. *Harsen et al.*, 7 Cow. Rep. 323. *Jackson ex dem. Low et al.* v. *Reynolds*, 1 Caines' Rep. 444. *Et vide Jackson ex dem. Bleecker* v. *Whitford*, 2 Caines' Rep. 215. *Jackson ex dem. Klien* v. *Graham*, 3 Caines' Rep. 188. *Barr* v. *Gratz's heirs*, 4 Wheat. Rep. 222, 223. *Tuttle* v. *Reynolds*, 1 Verm. Rep. 80.

A tenant who endeavors to deprive his landlord of the benefit of possession, under a fraudulent pretence of giving it up, is still to be considered a tenant, and cannot defend himself as a stranger, nor prevent, by any pretence, under such circumstances, his landlord from regaining possession. A person who comes into possession under a tenant is in no better condition than the tenant himself, and cannot defend his possession against the landlord. *Graham et al.* v. *Moore et al.*, 4 Serg. & R. Rep. 467, 470.

It has been decided, and is the settled law of the country, that a tenant shall not resist the recovery of his landlord, by virtue of an adverse title acquired during his lease. *Lessee of Galloway* v. *Ogle*, 2 Binney's Rep. 472. *Et vide Graham et al.* v. *Moore et al.*, 4 Serg. & R. Rep. 467.

The rule of law, that the tenant cannot contest his landlord's title, is not applicable, where the title of such landlord is a Connecticut title, existing in violation of the laws of Pennsylvania. Therefore, such tenant afterwards purchasing a Pennsylvania title, and continuing to hold under it, may set up against the original landlord, who claimed under a Connecticut title, though, subsequently to such purchase, the landlord also took out another Pennsylvania title. *Satterlee et al.* v. *Matthewson*, 13 Serg. & R. Rep. 133.

In the case of *Miller* v. *M'Brier*, in error, (14 Serg. & R. Rep. 384, 385,) Gibson, J., delivering the opinion of the court, said, "that a tenant cannot deny his landlord's title is certain; and, by an application of this rule to the circumstances of the case, the court excluded the evidence with which the defendant offered to impeach an *original* title, with which also the landlord set out. Where a landlord shows no title, but asks to be restored to the possession with which he parted, good faith requires it should be re-delivered to him, it being no answer to say he is not the owner of the land. But where, as in this case, he claims on the separate grounds of original title, and as having parted with the possession pursuant to a lease, the defendant will be permitted to meet him separately on each." *Et vide Camp.* v. *Camp.*, 5 Conn Rep. 300, 301.

Payment of rent by a lessee to a lessor, after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless, at time of payment, the lessee knows the precise

nature of the adverse claim, or the manner in which the lessor's title has expired. *Fenner* v. *Duplock et al.*, 2 Bing Rep. 10.

A tenant deriving title under a lease, cannot dispute his landlord's right by showing that the premises are in another patent. *Jackson ex dem. Bleecker* v. *Whitford*, 2 Caine's Rep. 215.

A purchaser, at a sheriff's sale, becomes *quasi* a tenant, and it is not to be presumed that he holds adversely. *Jackson ex dem. Klien* v. *Graham*, 3 Caines' Rep. 189; *Et vide Waring* v. *Jackson ex dem. Eden et al.*, 1 Peter's Rep. (Sup. Ct. U. S.) 570.

The possession of a defendant, after a sale under an execution, is not deemed adverse; for, he becomes *quasi* a tenant at will to the purchaser. *Jackson ex dem. Kanes* v. *Sternbergh*, 1 Johns. Cas. 153; *Russell* v. *Doty, Sheriff, &c.*, 4 Cow. Rep. 576; *Et vide Langdon* v. *Potter et al.*, 3 Mass. Rep. 128; *Den* v. *Winans*, 2 Green's Rep. 1. A party in possession which has been sold on execution against him, cannot defend himself in ejectment against the purchaser at a sheriff's sale, by setting up a mortgage executed by himself, before the judgment became a lien. *Lessee of Phelps* v. *Butler*, Ohio Con. Rep. 331.

A purchaser, under a judicial sale, has a right to resort to the whole judicial proceedings, under which his title accrued, to ascertain it. *Clarke* v. *Belmear*, 1 Gill & John. Rep. 443.

In an action by the purchaser of land at a sheriff's sale, against the defendant in execution, to recover possession, the latter cannot show title in another. *Avent* v. *Read*, 1 Potter's Rep. 480.

If the plaintiff in a judgment become the owner of the land upon which that judgment is a lien, the lien thereby becomes extinct by operation of law, and no subsequent sale of the land, by the sheriff upon that judgment, will vest a title in the purchaser. *Koons* v. *Hartman*, 7 Watts' Rep. 20.

One claiming under a deed from a judgment debtor, has not such an adverse possession as will avoid a conveyance executed by a purchaser under an execution upon the judgment. *Jackson ex dem. Scofield* v. *Collins*, 3 Cow. Rep. 89; see *Cleveland* v. *Demming*, 2 Verm. Rep. 534.

Where the plaintiff claims by virtue of the levy of an execution, and the defendant is a stranger to the title, and does not claim under the executive debtor, he will not be permitted to call in question the correctness of the judgment and execution, by virtue of which the plaintiff claims title. *Phelps* v. *Parks*, 4 Verm. Rep. 488.

But, in *M'Rae* v. *Smith*, (2 Bay's Rep. 339,) it was held that possession of land for five years under a sale from defendant, who has a judgment against him, will be a good bar against a judgment creditor, or those claiming under him, who has lain by that time without reviving his judgment, or bringing suit against such possessor.

If the equitable estate be confiscated, the Court, in ejectment, will not allow the outstanding legal title to be set up in bar of the title of the purchaser. *Lessee of Delancy* v. *M'Kean*, 1 Wash. C. C. Rep. 354.

In ejectment, when the defendant has shown title in a third person, the plaintiff cannot demur to the evidence till the defendant has gone through the whole. *Proprietary's Lessee* v. *Ralston*, 1. Dall. Rep. 18.

An application on which a survey has been made and returned, though the proprietor does not appear to have pursued his claim by entering upon the land or occupying it, or paying the purchase-money to the state or otherwise, except by bringing an ejectment, in which there was a verdict for the defendant, is a subsisting title in a third person, under which the defendant, in an ejectment, may protect himself. *Watson* v. *Gilday*, 11 Serg. & R. Rep. 337.

But, if both parties claim by improvement, and the plaintiff prove a settlement of boun-

The claimant must also be clothed with *the legal title* to the lands.(*a*)[1] No equitable title will avail. And this principle is so fixed

(*a*) *Goodtitle d. Jones* v. *Jones*, 7 T. R. 43, 47; *Doe d. Da Costa* v. *Wharton*, 8 T. R. 2; *Doe d. Blake* v. *Luxton*, 6 T. R. 289.

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daries between the defendant and himself, by agreement, the defendant cannot set up a title in a third person, to bar the plaintiff's recovery. Ib.

If the plaintiff in ejectment claim both on an original title, and by virtue of a lease from him to the defendant, it is competent to the defendant to depend on both grounds, and it is error in the Court to assume the existence of the lease, and prohibit the defendant from showing that the title is not in the plaintiff, but in a third person. *Miller* v. *M'Brier*, 14 Serg. & R. Rep. 382.

Since the rule is universal, that a plaintiff, in ejectment, must show the right to possession to be in himself positively, and it is immaterial as to his right to recover, whether it be out of the tenant or not, if it be not in himself, it follows, that a tenant is always at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself. *Love* v. *Simm's Lessee*, 9 Wheat. Rep. 515.

If defendant rely upon the original title of the proprietor, he must show the title to be subsisting either in the proprietor, or in himself derived from the proprietor. *Lessee of Allen* v. *Lyons*, 2 Wash. Circ Ct. Rep. 475.

An outstanding legal estate cannot, in Pennsylvania, be set up to bar a plaintiff entitled to the equitable estate. *Lessee of Delancy* v. *M'Kean*, 1 Wash. Circ. Ct. Rep 354.

If defendant sets up an outstanding title in a stranger to preclude the plaintiff from recovering, he must show a subsisting and available title on which the asserted owner might recover in ejectment if he were plaintiff. The defendant cannot avail himself of a title barred by the statute of limitations. *Lessee of Foster* v. *Joice*, 3 Wash. Circ. Ct. Rep. 498.

It is a settled doctrine, that the lessor of the plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's. Per Boyle, Ch. J., delivering the opinion of the court; *Colston* v. *M'Kay*, 1 Marsh. (Ky.) Rep. 251.

In ejectment, a plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's. But a defendant cannot avail himself of this rule against a plaintiff whom he has fraudulently induced to purchase a weak title. *Lane et al.* v. *Reynard*, (in error,) 2 Serg. & R. Rep. 64; contra, *Lessee of Walker* v. *Coulter*, Addis. Rep. 390.

The plaintiff in ejectment cannot recover on the weakness of the defendant's title; he must show title in himself. *Covert* v. *Irwin*, 3 Serg. & R. Rep. 283; *Lessee of Walker* v. *Coulter*, Addis. Rep. 390; *Lane* v. *Reynard*, 1 Serg. & R. Rep. 65.

The paintiff must recover on the strength of his own title, either as being in itself good against all the world, or good against the defendant by estoppel. *Clark* v. *Diggs*, 6 Iredell Rep. 159.

A title acquired after the date of the demise, cannot sustain an action of ejectment. *Baylor* v. *Neff*, 3 McLean, 302.

In ejectment, a plaintiff must show title in himself before the ouster laid in the declaration. *Buxton* v. *Carter*, 11 Miss. Rep. 481.

A plaintiff in ejectment, where his title depends upon a deed void for champerty, cannot recover against mere trespassers. *Michael* v. *Nutting*, 1 Smith's Ia. Rep. 291.

[1] To recover an ejectment, the lessor of the plaintiff must have a legal title in the land at the commencement and trial of the cause. *Carroll et al. lessee* v. *Norwood's heirs*, 5 Har. & Johns. Rep. 164.

and immutable, that a trustee may maintain ejectment against his own

Ejectment cannot be maintained unless the plaintiff has the legal estate in the premises. *Wright* v. *Douglass*, 3 Barb. Sup. Ct. Rep. 554.

An equitable claim cannot prevail against the legal estate. *Jackson ex dem. Potter* v. *Sisson*, 2 Johns. Cas. 321; *Jackson ex dem. Loop et al.* v. *Harrington*, 9 Cow. Rep. 88.

Especially if such equitable claim be doubtful. Ibid.

"In the action of ejectment, we must look steadily to the legal title." Per Kent, Ch. J., delivering the opinion of the court. *Jackson ex dem. Lathrop* v. *Demont*, 9 Johns. Rep. 60; *Winn* v. *Cole's heirs*, Walker's Rep. 119.

If the plaintiff have the legal title, the defendant cannot set up an equitale title in bar. *Jackson ex dem. Smith* v. *Pierce*, 2 Johns. Rep. 221. Same point, *Jackson ex dem. Potter* v. *Sisson*, 2 Johns. Cas. 321; *Jackson ex dem. Kemball* v. *Van Slyck*, 8 Johns. Rep. 487; *Jackson ex dem. Whitlock et al.* v. *Deyo*, 3 John's Rep. 422, 423; *Jackson ex dem. Simmons et al.* v. *Chase*, 2 Johns. Rep. 86; *Lessee of Spencer* v. *Mackel*, Ohio Con. Rep. 356.

"The only way in which an equitable title can be assisted at law, is, by allowing the presumption, in certain cases, to prevail, that there has been a conveyance of the legal estate." Per Thompson, J., delivering the opinion of the court. *Jackson ex dem. Smith et al.* v. *Pierce*, 2 Johns. Rep. 226.

In Pennsylvania, it seems, a valid *equitable* title is sufficient to sustain ejectment. *Hawn* v. *Norris et al.*, 4 Binn. Rep. 77: *Sim's Lessee* v. *Irvine*, 3 Dall. Rep. 425, 456, 457; see *Strother* v. *Lucas*, 6 Peter's Rep. 763; *Lessee of Swayze* v. *Burk*, 12 ib. 11.

For want of a Court of Chancery in that state, the action of ejectment may be resorted to, and can be maintained by the vendee against the vendor, to enforce specific performance of the agreement, wherever a Court of Equity would sustain a bill for that purpose. *Henderson* v. *Hays*, 2 Watts' Rep. 150.

A previous peaceable possession under claim of title, though for less than twenty years, where there has been no abandonment, is sufficient evidence of title against a trespasser, particularly where there has been a descent cast or a devise. *Smoot* v. *Lecatt*, 1 Stewart's Rep. 890; *Rochon* v. *Lecatt*, ib. 609.

But previous possession is not sufficient where there is adverse documentary title. *Hallett* v. *Eslava*, 2 Stew. Rep. 115.

It seems, if there is a clear intent to make land chargeable with money, ejectment may be supported, when it is the most convenient or only way of compelling payment from the proceeds of the land. *Galbraith et al.* v. *Fenton et ux.*, 3 Serg. & R. Rep. 35. (In Error.)

If the plaintiff in ejectment is bound in equity to make title to the defendant, for a part of the premises, the Court will do the defendant justice by staying execution upon the judgment, until the title is secured. *Lessee of Mathers* v. *Akewright*, 2 Binn. Rep. 93.

An ejectment may be commenced on a strict, legal title, and the plaintiff may rebut a countervailing equity, set up by the defendant on the trial. *Innis et al.* v. *Campbell et al.*, 1 Rawle's Rep. 373.

If incumbrances exist, they may be valued and allowed for by the jury. Ib.

The remedies in the Courts of the United States are to be at common law or in equity, not according to the practice of the state Courts, but according to the principles of common law and equity, as distinguished and defined in England; therefore, a title which, upon general principles, is merely equitable, will not support an ejectment, unless the statutes of the state have changed it into a legal title. *Robinson* v. *Campbell*, 3 Wheat. Rep. 212.

But when, by the statutes of a state, a title which would otherwise be deemed merely equitable, is recognized as a legal title; or, a title which would be good at law, is, under circumstances of an equitable nature, declared void, the rights of the parties, in such case,

cestui que trust,(a)[1] and an unsatisfied term outstanding in trustees will

(a) *Roe d. Reade* v. *Read*, 8 I. R. 118, 123.

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may be as fully considered in a suit at law, in the Courts of the United States, as they would in any state Court. Ib.

An action of ejectment cannot be maintained in the Circuit Court of Pennsylvania, upon an equitable title, alone. *Carson's Lessee* v. *Boudinot*, 2 Wash. C. C. Rep. 33.

In an action of ejectment brought against a third person, he cannot object that the title of the lessor of the plaintiff, founded on a conveyance by a trustee of the legal estate, is invalid, because in making it the trustee had abused his trust. Even those who may be injured can have redress only in equity. *Lessee of Bayard* v. *Colfax et al.*, C C. S. N. J., April, 1821, MS. (cited in Coxe's Digest, 272, sec. 41.)

An agreement, signed by the agent of the lessor of the plaintiff in ejectment, for the sale and conveyance of the land to the defendant, cannot be given in evidence in a trial at law; it is, at most, evidence only of an equitable title. *Lessee of Willink* v. *Mills*, 1 Peters' C. C. Rep. 429.

The plaintiff in ejectment must show that he has the oldest *legal title* in himself. *Talbot* v. *Callaway*, Hard. Rep. 35. *Quarles* v. *Brown*, ibid. 36. (Cited by the court.)

A prior possession is sufficient to entitle a party to recover in an action against a mere intruder or wrong doer; if, however, there has been delay in bringing the suit, the *animus resalendi* must be shown and the delay satisfactorily accounted for, or the prior possessor will be deemed to have abandoned his claim to the possession. *Whitney* v. *Wright*, 15 Wen. 171. See *Sowreer* v. *M'Millan's Heirs*, 4 Dana's Rep. 461.

An open and exclusive possession and improvement of land for any considerable time, claiming title thereto, is such presumptive evidence of title in the possessor, that an attaching creditor of a third person, in whom is the record evidence of title, will be held to be affected, with notice of a deed from his debtor to the party in possession, though such deed might have been recently given, in execution of a contract of purchase under which the possession was taken and not recorded. *Publee* v. *Mead*, 2 Verm. 544.

One who owns a proprietor's right in a town, may recover in ejectment against any one who is in possession without a title. *Pomeroy* v. *Mills*, 3 Verm. Rep 410.

A defendant who does not derive his possession from the plaintiff, but claims adversely, may, at any time before trial, purchase in an outstanding title to protect his possession. *Tucker's Executors* v. *Keeler*, 4 Verm. 161.

A mortgagor cannot dispute the title of the mortgagee. *Reed* v. *Shepley*, 6 Verm. Rep. 602.

The defendant who had sold the premises to the lessor of the plaintiff, will not be permitted to show a title out of himself at the time of making the deed. *Den* v. *Winans*, 2 Green's Rep. 1.

In ejectment, a deed delivered as an escrow cannot be set up as an outstanding title. *Lessee of Lloyd* v. *Giddings*, 7 Ham. Cases, 52, 2d part.

[1] A trustee, holding the legal title, may maintain ejectment even after the trust is satisfied. Although a *cestui que trust*, after the trust is satisfied, may maintain ejectment, that does not deprive the trustee holding the legal title of his right to maintain such an action. *Hopkins, &c.* v. *Stephens et al.*, 2 Randolph's Rep. 422.

Where the defendant in ejectment has only an equitable title to hold real estate till certain moneys are reimbursed, the plaintiff is entitled to recover, if such moneys are reimbursed at the time of trial; but if the defendant has a legal title of that description, the plaintiff

bar the recovery of the heir-at-law, even though he claim only subject to the charge.(*a*) In the time of Lord Mansfield, indeed, the Court of King's Bench adopted a different principle, and exercised a species of equitable jurisdiction in this action. Thus a mortgagee was *permitted to maintain ejectment against a tenant, claiming under a lease granted prior to the mortgage, provided he gave notice to the tenant that he did not intend to disturb the possession, but only to get into the receipt of the rents and profits of the estate;(*b*) the legal estate of a trustee was not allowed to be set up against the *cestui que trust*;(*c*) an *agreement* for a lease was held tantamount to a lease;(*d*) and a reversioner was allowed to recover his reversionary interest, subject to a lease and immediate right of possession in another.(*e*) But these cases have long been overruled,[1] and the clearness and certainty of the principle since adopted, amply compensate for the partial inconvenience it may at times occasion.

(*a*) *Doe d. Hodson* v. *Staple*, 2 T. R. 684; *Burnes* v. *Crow*, 4 Bro. C. C. 2.

(*b*) *Keech d. Warne* v. *Hall*, Doug. 21; *Moss* v. *Gallimore*, Doug. 279, B. N. P. 96.

(*c*) *Lade* v. *Holford*, B. N. P. 110; S. C., Burr. 1416; S. C., Blk. 428; *Doe d. Hodson* v. *Staple*, 2 T. R. 684; *Doe d. Gibbon* v. *Pott*, Doug. 710, 721, *et vide*, *Oates d. Wigfall* v. *Brydon*, Burr. 1895, 1901.

(*d*) *Weakley d. Yea* v. *Bucknell*, Cowp. 473.

(*e*) Per Buller, J., in *Doe d. Bristow* v. *Pegge*, 1 T. R. 759, (in *notis*.)

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cannot recover unless the moneys were reimbursed at the institution of the ejectment. *Thomas* v. *Wright*, (in error,) 9 Serg. & R. Rep. 87.

In Pennsylvania, ejectment is an equitable action, and wherever chancery would execute a trust or decree a conveyance, the courts of this state, with the instrumentality of a jury, will direct a recovery in ejectment. *Perbles* v. *Reading*, 8 Serg. & R. Rep. 484.

In Pennsylvania, ejectment may be maintained in the name of the warrantee, although he may have no beneficial interest in the land, and might not have known of the action. *Campbell* v. *Galbreath*, 1 Watts' Rep. 70.

Upon the death of the trustee pending the ejectment, his devisees are the proper persons to be substituted as plaintiffs. *Hunt* v. *Crawford*, 3 Penn. Rep. 426.

A trustee may recover in ejectment against his *cestui que trust*. *Beach* v. *Beach*, 14 Verm. 28. A jury will not be directed to presume a conveyance where the trustee could not be authorized to convey, or where it was evidently intended that the legal estate should remain in the trustee. Ib.; and see *Mathews* v. *Ward*, 10 Gill. & Johns. Rep. 443.

[1] But in the case of the *Town of North Hempstead, &c.* v. *The Town of Hempstead, &c.*, (2 Wen. Rep. 109, 134,) it was recently adjudged, by the unanimous decision of the Court for the correction of errors, that *cestuis que trust*, in the case of a *resulting trust*, may maintain or defend ejectment for the lands which constitute the trust property. In that case, Savage, Ch. J., delivering the opinion of the Court, said, "There is still another ground on which the title in the town may be sustained. It is fairly inferable, that if any consideration was paid in the first instance, all the inhabitants contributed to it. The grant is to the patentees and their associates, heirs, successors and assigns. If the patentees were

Formerly, also, it was necessary that the claimant should have what was termed a right of entry into, or possession of, the land, as distinguished from a right of property or action therein, *and much abtruse learning is extant in the old authorities as to the modes by which one of these species of titles might be converted into the other;[1] but the ancient distinctions between these different rights having been abolished by stat. 3 & 4 Wm. IV., ch. 27, and stat 21 Jac. I., ch. 16, upon which the rights arising from adverse possession are founded, also, in effect repealed by its provisions, it has become unnecessary to discuss the principles by which descents cast, disseisin, and warranty were governed, or to encumber this Treatise with unsatisfactory decisions upon the doctrine of adverse possession.(*a*)[2] [*34]

(*a*) *Nepean* v. *Doe*, 2 M. & W. 894.

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trustees, and the *cestuis que trust* paid the consideration, there was then a resulting trust in their favor; and such *cestuis que trust* have been considered as possessing the equitable estate, and the legal also, so far as to enable them to defend or maintain an action of ejectment for lands thus held by them."

A *cestui que trust*, after the purposes of the deed had been satisfied, may maintain ejectment, upon a demise, in his own name, although the *legal* estate is still in the trustee. *Hopkins & Watson* v. *Ward and others*, 6 Munford Rep. 38.

A cestui que trust entitled to the enjoyment of the possession of land, may maintain ejectment to recover it in his own name either against a trustee or a stranger. 1 Watts & Serg. 9.

Where land is conveyed in trust, with power to sell and apply the proceeds to the payment of a debt, the payment of the debt does not divest the trustee of the legal estate, so that the *cestui que trust* may maintain ejectment. *Moore* v. *Burnet*, 11 Ohio Rep. 334.

[1] *City of Cincinnati* v. *White*, 6 Peters' Rep. 431. Where a grantor who has a right of entry on lands conveys it to another, he therewith necessarily conveys the power to maintain ejectment for it. *Gloynoro* v. *Jones*, 3 Gill & Johns. Rep. 173.

"This suit was brought before the termination of the life estate; and it appears by the plaintiff's own showing, not only that his estate is ended, but that the defendant has the reversionary interest. The plaintiff, then, has no title to turn the defendant out of possession; but he has a title to the *mesne* profits and costs of this suit, and must, therefore, have judgment to enable him to recover them." Per Spencer, Ch. J., delivering the opinion of the Court; *Jackson ex dem. Henderson* v. *Davenport*, 18 Johns. Rep. 302.

If the right or title of the plaintiff in ejectment, expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be entered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed; and that as to the premises claimed, the defendant go thereof without delay. Revised Statutes of New York, part 3, chap. 5, tit. 1, sec. 31, (vol. 2, p. 308.)

Disseisin, descent cast, &c.

[2] It is scarcely possible to suggest a case, in which the doctrine of descent cast can be now so applied, so as to prevent a claimant from maintaining ejectment, as, from the principles

The stat. 3 & 4 Wm. IV. c. 27, justly entitled "an Act *for the limitation of actions and suits relating to real property, and for simpli-

of disseisin at election, he may always lay his demise in the time of the ancestor, and elect not to be disseised. But a general account of the doctrine of descent cast is given here, in order to render this part of the subject complete. Vide *Taylor d. Atkins* v. *Horde*, (Burr. 60,) where the history and principles of the doctrine of descent cast are most ably investigated by Lord Mansfield. Vide also *William d. Huges* v. *Thomas*, (12 East, 141.) [2]

Where the first possessor died, and a descent was cast, and the infant heirs were driven from the actual possession by a public enemy, the possession was considered by the equity of the *just postliminii*, as revested in the heirs on the removal of the hostile force. *Smith ex dem. Teller* v. *Lorillard*, 10 Johns. Rep. 338.

Where a person dies possessed of land, it is *prima facie* evidence of title in his heirs by descent. *Smith ex dem. Teller* v. *Lorillard*, 10 Johns. Rep. 355.

It has been decided in our Courts, that to constitute a disseisin, upon which a descent may be cast, it must be commenced by wrong, and founded on an ouster of the true owner. There must be a disseisin in fact. *Doe ex dem. Arden et al.* v. *Thompson*, 5 Cow. Rep. 374; 6 Johns. Rep. 216; 7 Wheat Rep. 107.

"The law will never construe a possession tortious unless from necessity. On the other hand, it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful." *Ricard* v. *Williams et al.*, 7 Wheat Rep. 107; per Story, J., delivering the opinion of the Court: vide *Den ex dem. Clark* v. *Lane*, 1 Penn. Rep. 417. contra, (*et semble.*)

There cannot be an *actual* ouster of a reversion. *Doe ex dem. Truscott* v. *Elliot*, 1 Barn & Ald. Rep. 86.

In an ejectment, the plaintiff must show, and it is sufficient if he does show, a right of entry, or, in other words, a right of possession. If he prove twenty years possession, or the seisin of his ancestor, and a descent cast, it is sufficient *prima facie*, and unless defendant show a better right, the plaintiff must succeed. *Hylton's Lessee* v. *Brown*, 1 Wash. Circ. Ct. Rep. 204.

The doctrine of "descent cast" is abrogated by the Revised Statutes of New York, part 3, chap. 4, tit. 2, sec. 15, (vol. 2, p. 295.)

"Sec. 15. The right of any person, to the possession of any real estate, shall not be impaired or affected by a descent being cast in consequence of the death of any person in possession of such estate."

In the case of *Lessee of Rugge* v. *Ellis*, (1 Bay's Rep. 111,) Waties, J., delivering the opinion of the court, said, "This action [ejectment] has been allowed in this country, even where the right of entry has been tolled by descent cast. It ought to be so—the rigid forms of ancient real actions have long since been mouldering away, and giving place to others more liberal and better calculated to answer the ends of justice." See *Lessee of Holt's heirs* v. *Hemphill's heirs*, Ohio Con. Rep. 551.

"The distinction between a disseisin by election, as contradistinguished from a disseisin in fact, was taken for the benefit of the owner of the land, and to extend to him the easy and desirable remedy by assize, instead of the more tedious remedy by a writ of entry. Whenever an act is done which of itself works an actual disseisin, it is still taken to be an actual disseisin, as if a tenant for years or at will should enfeoff in fee. On the other hand, those acts which are susceptible of being made disseisins by election are no disseisins till the election of the party makes them so, as if a tenant at will, instead of making a feoffment in fee, should only make a lease for years." *Jackson ex dem. Van Alen* v. *Rogers*, 1 Johns. Cas. 36, 37. (Per Kent, J.,) ibid. 43.

fying, the remedies for trying the rights thereto," has introduced an entirely new principle into our remedial law. By that statute all titles

"Making a devise has been deemed an intimation of an election not to be disseised. (*Pously* v. *Blackman*, Palm. 205. Cro. Jac. 659.)" 1 Johns. Cas. 37, 44. 2 Caines' Cas. Er. 316.

"The conveyance in fee of the tenant was a disseisin of the landlord or not, at his election. For the sake of his remedy, he had a right to consider the grantee a disseisor. But he cannot constitute himself a disseisor in spite of his landlord." *Jackson ex dem. Van Shaick et al.* v. *Davis*, 5 Cow. Rep. 134. (Per Sutherland, J., delivering the opinion of the court.)

"It has also been argued at the bar, that a person who commits a disseisin cannot qualify his own wrong, but must be considered as a disseisor in fee. This is generally true; but it is a rule introduced for the benefit of the disseisee, for the sake of electing his remedy. For if a man enter into possession under a supposition of a lawful limited right, as under a lease, which turns out to be void, or a special occupant, where he is not entitled so to claim, if he be a disseisor at all, it is only at the election of the disseisee. Com. Dig. Seisin. F. 2 and F. 3. 1 Roll. Abrid. 662, l. 45, id. 661, l. 45.

Where one having no title conveys to a third person, who enters under the conveyance, the laws holds him to be a disseisor. *Bradstreet* v. *Huntington*, 5 Peter's Rep. 402.

Where there has been an actual disseisin, the disseisee cannot *elect* to consider himself as *not* disseised. *Davis et ux.* v. *Martin*, 3 Munf. Rep. 285.

In the case of *Prescott et al.* v. *Nevers et al.*, (4 Mason's Rep. 326, 329,) Story, J., delivering the opinion of the court, said, "There is a distinction between disseisins which are *in spite* of the owner, and disseisins at his election. But the distinction often turns upon other principles than those which have been stated. The owner cannot elect to consider himself disseised, when the act is not of such a nature as in law affords a presumption of a disseisin. But where an act is done which is equivocal, and may be either a trespass or disseisin, according to the intent, there the law will not permit the wrongdoer to qualify his own wrong, and explain it to be a mere trespass, unless the owner elects so to consider it."

In the case of *Varick et al.* v. *Jackson ex dem. Eden et al.*, in error, (2 Wen. Rep. 166.) Walworth, Chancellor, who delivered the unanimous opinion of the court, said, "But the principal question in this cause is as to the validity of the devise of Medcef Eden the younger. Two kinds of disseisin are mentioned in the English law books. The one was a disseisin in fact, which actually changed and divested the seisin of the original owner of the freehold, and deprived him of all right in relation thereto, except the mere right of entry and of property; and which, under certain circumstances, was still further reduced to a mere right of action, the right of entry being lost.

"By this species of disseisin the wrongdoer acquired a fee simple, and the actual seisin of the property, together with nearly all the rights of the real owner, and all estates depending on the original seisin, were divested or displaced. The other kind of disseisin was called disseisin by election, because the owner might elect to consider himself disseised, for the sake of the remedy by action of *novel disseisin;* but if he did not elect to consider himself disseised, the freehold was not divested, but still continued in him. (*Bledden* v. *Baugh*, Cro. Car. 302.

"Disseisin *in fact* and disseisin by *election* have been so frequently confounded, that in examining the *dicta* of judges it is sometimes difficult to understand to which species of disseisin they allude, without referring particularly to the facts of the case which they had under consideration at the time such *dicta* were delivered. But by a careful examination of the

to land are reduced to possessory titles, so that the right of recovery and the remedy by ejectment are made co-extensive, whilst the mere

authorities, it will be found that there could be no disseisin in fact, except by the wrongful entry of a person claiming the freehold, and an actual ouster or expulsion of the true owner, or by some other act which was tantamount: such as a common law conveyance, with livery of seisin, by a person actually seised of an estate of freehold in the premises; or some one lawfully in possession representing the freeholder, (1 Instit. 330, C. note 1;) or by a common recovery, in which there was a judgment for the freehold, and an actual delivery of seisin by the execution, or by levying a fine, which is an acknowledgment of a feoffment of record. 2 Blk. Com. 348; Co. Litt. 330, C. note 1; *Doe* v. *Thompson*, 5 Cowen's Rep. 371; *Smith* v. *Burtis*, 6 Johns. Rep. 197.

"In this case there was no expulsion of the tenant of the freehold, and Medcef Eden, the younger, did no act which could possibly be construed into an election to consider himself disseised. When Boyd took possession of the premises in 1805, it was during the life of Joseph Eden, and of course before the happening of the contingency which afterwards divested the estate acquired under the conveyances of the first of September, 1804, and the first of May, 1805. By those conveyances, Boyd acquired all the right of Joseph Eden, which was an estate in fee, subject however to be defeated by the death of Joseph without issue, during the lifetime of Medcef. His entry, therefore, was congeable and divested no estate. None of the conveyances executed during the life of Joseph Eden were common law conveyances with livery of seisin, and of course divested no rights but those of the grantors. By the death of Joseph Eden in 1813, the title vested in Medcef; and the holding over of the person in possession, after the termination of his estate in the premises, could not be a disseisin of the rightful owner. After that time, the rights of the parties were not altered previous to the death of Medcef Eden. There was then nothing to prevent the operation of his will, unless the bare holding over of a tenant for life, after the determination of his estate and claiming the fee, can have that effect."

Disseisin is an estate gained by wrong and injury; and therein it differs from dispossession, which may be by right or wrong. This is the uniform language of the best authorities from the time of Littleton. (Litt. s. 279; Co. Litt. 3 b. 18 b. 153 b. 181 a; Cro. Jac. 685; 1 Salk. 246, n. 2; 1 Burr. 109.) Per Kent, Ch. J., delivering the opinion of the court in *Smith ex dem. Teller et al.* v. *Burtis et al.*, 6 Johns. Rep. 217. *Doe ex dem Arden et al.* v. *Thompson*, 5 Cow. Rep. 374.

If A. be tenant of the freehold, and B. tortiously enter upon and turn the sub-tenant of A. out of possession, claiming the land as his absolute property; and he, or those claiming under him, continue to hold the same, by actual adverse possession, until the death of A., this is an actual disseisin of A. *Davis et ux.* v. *Martin*, 3 Munf. Rep. 285.

Where one had erected, and continued for sixty years, buildings on piles driven in ground covered by a mill-pond belonging to another, this was held to amount to a disseisin of the owner of the mill-pond, and to bar him of his right to the land so occupied. *Boston Mill Corporation* v. *Bulfinch*, 6 Mass. Rep. 229.

If a man enters upon land under a deed duly registered, though from one having no legal title to the land, and has a visible possession, occupancy and improvement of only a part of it, such occupation and improvement, unless controlled by other facts, is a disseisin of the true owner, as to the whole tract; because the extent and nature of his claim may be known by inspection of the public registry; for the 6th section of the act of limitation of Maine, ch. 2, was enacted to abolish the distinction existing between a possession under a deed recorded, or a possession without such title. *Proprietors of Kennebec Purchase* v. *Laboree et al.*, 2 Greenl. Rep. 275, *et vide* (S. P.) *Little* v. *Megquier*, ibid. 176.

acquiescence of a claimant, or succession of claimants in the same right (being under no legal disabilities), in the possession of the land by a

In the case of *Small* v. *Proctor*, (15 Mass. Rep. 498,) Wilde, J., delivering the opinion of the court, said—"Whatever may have been the ancient doctrine of disseisin, in relation to feudal tenures, it has ever been held in this state, that an entry on vacant or uncultivated land, by one claiming to hold it, having no right, and without permission of the owner, accompanied with occupation or open visible possession, is sufficient to constitute a disseisin. This principle has been too frequently recognized to be now controverted." 4 Mass. Rep. 416; 6 Mass. Rep. 299; 14 Mass. Rep. 200.

Disseisin does not necessarily imply a forcible entry or actual ouster by violence or fraud; for in cases of vacant possessions, a simple tortious entry and open exclusive possession under claim of adverse title, are equivalent to such entry and ouster. Et vide *Hall et al.* v. *Powel*, 4 Serg. & R. Rep. 465.

"A mere entry upon another is no disseisin, unless it be accompanied with expulsion, or ouster from the freehold." *Smith ex dem. Teller et al.* v. *Burtis et al.*, 6 Johns. Rep. 217. Per Kent, Ch. J., delivering the opinion of the court. *Doe ex dem. Arden et al.* v *Thompson*, 5 Cow. Rep. 374. Per Woodworth, J., delivering the opinion of the court.

As to what constitutes a disseisin, see *Dow* v. *Plummer*, 5 Shepl. Rep. 14; *Towle* v. *Ayer*, 8 N. H. 57; *Tilton* v. *Hunter*, 11 Shepl. 29; *Thayer* v. *M'Lellan*, 10 Shepl. 417; *Bailey* v. *Carleton*, 12 N. H. 9; *Melvin* v. *Proprietors of Locks, &c.*, 5 Metc. Rep. 15; *Brown* v. *King*, 5 Metc. Rep. 173; *Hall* v. *Mathias*, 4 Watts & Serg. 331.

A peaceable entry upon land, apparently vacant, furnishes *per se*, no presumption of wrong. 6 Johns. Rep. 218; 5 Cow. Rep. 374.

The disseisor is "bound to show his tortious seisin affirmatively." 5 Cow. Rep. 374; 6 Johns. Rep. 118.

Where the entry is *congeable*, it cannot work a *disseisin*. *Ricard* v. *Williams et al.*, 7 Wheat. Rep. 107; 6 Johns. Rep. 218; *Higginbotham et al.* v. *Fishback*, 1 Marsh. Rep. (Ky.) 506; 6 Johns. Rep. 218; 5 Cow. Rep. 374; *Jackson ex dem. Van Alen* v. *Rogers*, 1 Johns. Cas. 37, 47; *Jackson ex dem. June* v. *Raymond*, ibid. 86, (in note,) et vide *Brown* v. *Porter*, 10 Mass. Rep. 100.

Tenant for life levied a fine, and afterwards devised the premises, and died seised; the devisee, (the defendant in ejectment,) entered and continued in possession; and his counsel contended that this case fell within the definitions of a disseisin which had been referred to from Littleton and Lord Coke. But Lord Ellenborough, Ch. J., answering him thus: "All the definitions include an *ouster* of the tenant, *a wrongful putting of him out:* and there lies your difficulty: there is an entry of the one party, but what ouster or putting him out of the other is there?" *Williams, Lessee of Hughes et ux* v. *Thomas*, 12 East's Rep. 141, 152.

If the original entry of a party were lawful or *congeable*, no subsequent act of his whilst continuing in the possession acquired by such entry, can amount to a technical actual *disseisin* of the true owner.

In the case of *Doe ex dem. Davis* v. *Davis*, (1 Car. & P.'s Rep. 130,) the plaintiff was the eldest, and the defendant the second son of a Mr. Davis, who was seised in fee of the house for which the present ejectment was brought. It appeared that the defendant had lived with his father for some time previous to his death at the house in question, and continued to reside in the house after the father's death, when he levied a fine with proclamations, which was proved; and the defendant's counsel contended that he must succeed, as there had been no actual entry by the lessor of the plaintiff, but Park, J., considered such entry unnecessary, as the second son merely continued in the house he had rightfully resided in

stranger, without enforcing his or their rights by legal proceedings for a period of twenty years, is an effectual bar to all claim against the

during his father's lifetime; and that he was not seised of the freehold rightfully or by disseisin. His lordship therefore directed a verdict for the plaintiff.

A rule *nisi* for a new trial having been obtained, and the case argued in the Court of Exchequer:—

Graham, B., now delivered the opinion of the Court. "In this case a second son is left in possession at the death of his father, and levies a fine. The question is, whether he has a freehold by disseisin. A person, to levy a fine, must either have a freehold by right or by wrong. And if by wrong, the cases show, that the possession must be adverse. There must be a wrong in the original entry. Now here the defendant was permitted to enter by his father, which is clearly not a tortious entry; and in *Doe* v. *Perkins*, Lord Ellenborough and the rest of the Court *held*, that if a man held over on a lease, and a descent was cast, the entry was not tolled; because the possession of the defendant's ancestor did not originate tortiously. We are therefore of opinion, that the present defendant's possession was not a disseisin of the freehold." Rule discharged.

In the case of *The Proprietors of the Kennebe Purchase* v. *Stringer*, (4 Mass. Rep. 418, 419,) Parsons, Ch. J., delivering the opinion of the Court, said: "When a man not claiming any right or title to the land shall enter on it, he acquires no seisin, but by the ouster of him who was seised, and he is himself a disseisor. To constitute an ouster of him who was seised, the disseisor must have the exclusive occupation of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession. When a disseisor claims to be seised by his entry and occupation, his seisin cannot extend further than his actual exclusive occupation; for no farther can the party seised be considered as ousted; for the acts of a wrong doer must be construed strictly, when he claims a benefit from his own wrong.

"On considering the evidence, we are satisfied that the defendants were not disseised until 1792, by the entry of the tenant: that the running round of the land by a surveyor, and making the lines, by the direction of one who claims no title to the land, is not such an exclusive occupation of the land as can amount to an ouster or disseisin of the demandants. Neither can the occasional cutting of the grass on the meadow by Springer, who does not appear to have claimed the land, amount to disseisin.

"To constitute a disseisin of the owner of uncultivated lands, by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety, that the owner may be presumed to know that there is a possession of the land adverse to his title: otherwise a man may be disseised without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his seisin has been interrupted."—Et vide *Watrous* v. *Southworth*, 5 Conn. Rep. 305, 311.

In the case of *Pray* v. *Pierce* (7 Mass. Rep. 381, 383,) the tenant read in evidence a deed from one James Witherill, a collector of taxes, to one Charles Clarke, dated October 18th, 1791, duly executed and recorded December 15th, 1792, wherein, for the consideration of, &c., the said collector granted, &c., the demanded premises in fee, saving to the owner the right of redeeming the same.

There was no evidence that the said collector had conformed to the requirements of the law, in relation to the sale of the land; Clark, under color of the conveyance, fenced the land, and depastured his cows upon it; he demised it by parol to the tenant Pierce, who occupied it, under the said demise from the year 1798, to the time of trial, at October term, 1810.

party so possessed, and such possession undisturbed for forty years, gives to him an absolute indefeasable title to the property; not-

The defendant showed a regular chain of title to the demanded premises, by sundry conveyances (commencing in the year 1779,) down to Ivory Hovey; and also a quit claim deed, dated February, 1st, 1793, duly executed and recorded, June 24th, 1794, wherein the said Hovey, in consideration, &c., conveyed the demanded premises, together with other parcles of land, to the demandant, Pray.

On the trial, a verdict was rendered for the demandant, and, upon a motion for a new trial, upon exceptions taken by the tenant, the Court said: "Another exception is, that at the time when Hovey conveyed to Pray, the demandant, Hovey was disseised by Clark, under whom the tenant claims.

"This objection must depend upon the facts which are in the case. From Hardison's testimony, it is in evidence that he had the care of the land for Hovey, until he understood that Hovey had made a conveyance of it to the demandant. To control this testimony, the tenant has produced to us testimony that Clark, previous to the conveyance from Hovey to the demandant, had under color of the collector's conveyance to him, fenced the land, and depastured his cows upon it. But there was no evidence that Hovey had any notice of these acts of Clark. Unquestionably had Clark had a good title, and had he under that title done those acts, it would have been good evidence of legal seisin in him. But, as nothing passed by the collector's deed to him, those acts of his must be deemed to be trespasses. But they cannot amount to an ouster of Hovey, until evidence that Hovey had notice of them. Otherwise a private act of trespass on the soil of another might be evidence of an ouster, without any knowledge on the part of the owner of the land. This notice may be proved either by direct evidence of the fact, or the jury may presume it from circumstances in evidence; as, when it is proved that the owner's cattle have been turned off the land, or his servants refused an entry, &c.; or a continuance of the trespass for a long time is shown, when the owner or his agent lives in the neighborhood. But, whatever may be the evidence of this notice, it is a fact to be found by the jury, and the Court cannot presume it. And as, in the case before us, this notice is not stated as a fact proved, Hovey must be considered as seised at the time of his conveyance to the demandant: and so, this objection fails."

In the case of *William, Lessee of Hughes et ux.* v. *Thomas*, (12 East's Rep. 154,) Lord Ellenborough, Ch. J., said: "Now, here tenant for life levied a fine, and continued in possession till her death; having devised to the defendant, who, after her death, entered and continues in possession; and this is contended to be, of necessity, a disseisin: but, what act has he done to make him a disseisor? The lessor of the plaintiff never was in possession, and, therefore, could not be disseised or put out of possession. It does not even appear that the defendant was cognizant of the claim of the lessor. Disseisin was formerly a notorious act, when the disseisor put himself in the place of the disseisee, as tenant of the freehold, and performed the acts of the freeholders, and appeared in that character in the Lord's Court. But what act of notoriety is here stated to have been done by the defendant, as claiming to put himself in the place of the rightful freeholder? It would be carrying the doctrine of disseisin further than any other case has done, to say, that the mere taking of the rents and profits, as devisee of the land, is a disseisin, without meaning to do this adversely to the party entitled; for, it does not even appear, that when he entered, he knew of the lessor's claim."

To constitute disseisin, the possession of the disseisor must have been adverse to the title of the true owner, as well as open, notorious, and exclusive. *Little* v. *Libby*, 2 Greenl. Rep. 242.

withstanding there may have been a continued existence of legal disabilities in the rightful owners.

"After a mortgage, if the mortgagor remains in possession, it is not a disseisin of the mortgagee." *Gould* v. *Newman*, 6 Mass. Rep. 241, (Per Parson, Ch. J., delivering the opinion of the court.)

Where one enters upon land, under a deed duly acknowledged and recorded, he acquires a freehold either by right or wrong: if by wrong, it is an actual disseisin of all claiming the land under a different title. *Higbee et al.* v. *Rice*, 5 Mass. Rep. 344.

An entry on land, under a deed recorded, and payment of taxes, is no evidence of a disseisin of the true owner, unless the person who entered has continued openly to occupy and improve it. *Little* v. *Megquier*, 2 Greenl. Rep. 176.

"And it is also to be observed, that the acts of disseisors are, in respect to the lawful owner or true proprietor, to be limited to an actual ouster and exclusive occupation of such disseisors, and shall not be extended by construction according to their claims under invalid deeds or other conveyancing." *Brimmer* v. *The Proprietors of Long Wharf*, 5 Pick. Rep. 135. Per Putnam, J., delivering the opinion of the Court.

Part of premises, held in joint tenancy, cannot be conveyed by metes and bounds to a third person; nor can one, entering by virtue of such a conveyance, disseise the other joint tenants. *Porter* v. *Hill*, 9 Mass. Rep. 34.

"A disseisin may be purged either by the disseisor's abandonment of the possession, or his consent to hold under the disseisee." *Small* v. *Proctor*, 15 Mass. Rep. 499. Per Wilde, J., delivering the opinion of the Court.

Whether an infant can be disseised, and is then bound to bring his action within ten years after coming of age? *Quære.* *Jackson ex dem. Rensselaer* v. *Whitlock*, 1 Johns. Cas. 213.

There can be no disseisin of an equitable estate. *Marquis Cholmondeley et al.* v. *Lord Clinton et al.*, 2 Meriv. Rep. 361.

In the state of Maine, "Where a person enters into possession under a *recorded* deed claiming title to the entirety, and exercises acts of ownership, it is a disseisin of all persons who claim title to the same land to the extent of the boundaries in the deed." *Prescott et al.* v. *Nevers et al.*, 4 Mason's Rep. 326.

"After a sale of land by articles of agreement, and payment of the purchase money, the vendee died, and his wife and children left the land: the vendor placed a tenant on it, and the possession continued in him, and those claiming under him, twenty-one years: *held*, that it was erroneous to charge the jury that the putting on the tenant was not an ouster, unless they believed that the vendor intended to commit an ouster." *Pipher et al.* v. *Lodge et al.*, 16 Serg. & R. Rep. 214.

"There can be no legal doubt that one tenant in common may disseise another. The only difference between that and other cases is, that acts which, if done by a stranger, would *per se* be a disseisin, are, in the case of tenancies in common, perceptible [susceptible?] of explanation, consistently with the real title. Acts of ownership are not, in tenancies in common, necessarily acts of disseisin. It depends upon the intent with which they are done, and their notoriety. The law will not presume that one tenant in common intends to oust another. The fact must be notorious, and the intent must be established in proof." *Prescott et al.* v. *Nevers et al.*, 4 Mason's Rep. 330, (per Story, J., delivering the opinion of the court.)

A disseisin may be effected without the actual knowledge of the owner of the land; acts of notoriety, such as putting a fence round the land or erecting buildings upon it, being constructive notice to all the world. *Poignard* v. *Smith*, 5 Picker. Rep. 172.

In order, therefore, to determine whether a party claiming lands can proceed to recover them by ejectment, it is necessary to consider, firstly,

Where one of several joint tenants, who became such by disseising another, dies seised after continuing in peaceable possession five years, no descent is cast, and consequently the owner's right of entry is not tolled. *Putney* v. *Dresser*, 2 Mete. Rep. 583.

The question of *disseisin* is to be left to the decision of the jury.

In the case of *Jackson ex dem. Van Alen* v. *Rogers*, 1 Johns. Cas. 49, Lewis, J., said, "The reference of Holland's interest to the jury was right upon every principle. Whether he was or was not a disseisor is not, as has been mistakenly supposed, a question of law, but of fact. Disseisin, says Lord Mansfield, in the case last cited, (*Taylor ex dem. Atkyns* v. *Horde*,) is a fact to be found by a jury."

Adverse possession.

An adverse possession will be negatived when the party claiming title has never, in contemplation of law, been out of possession. This point is decided in *Barr* v. *Gratz's heirs*, 4 Wheat. Rep. 223. *Mather* v. *The Ministers of Trinity Church and others*, 4 Serg. & R. Rep. 509. *Cluggage et al.* v. *Duncan's Lessee*, 1 Ib. 118. *Proprietors of Kennebec Purchase* v. *Springer*, 4 Mass. Rep. 418. *Et vide Gay* v. *Moffit*, 2 Bibb's Rep. 508. *Green* v. *Liter et al.*, 8 Cranch's Rep. 229. *Commonwealth* v. *M'Gowan*, 4 Bibb's Rep. 62. *Chiles* v. *Calk*, 4 ibid, 554. *Harlock et al.* v. *Jackson*, 1 Coustit. Rep. 135. *Bryant* v. *Allen et al.*, 2 Hayw. Rep. 74. *Sawyer* v. ——, ibid. 235. *Symonds* v. *True Blood*, ibid. 235. *Hord* v. *Bodley*, 5 Littell's Rep. 88. *Smith et al.* v. *Morrow*, 5 Littell's Rep. 210. *Taylor* v. *Shield's heirs*, 5 Littell's Rep. 296. *Daniel* v. *Ellis*, 1 Marsh. Rep. (Ky.) 60. *Codman et al.* v. *Winslow*, 10 Mass. Rep. 151. *Commonwealth* v. *Dudley*, 10 Mass. Rep. 408. *Wells* v. *Prince*, 4 Mass. Rep. 64.

"He who makes title to a tract of land, and is in possession of part, is in possession of the whole, according to the true limits and real position of the land." (Per Chase, J.,) *Ridgley's Lessee* v. *Ogle et al.*, 4 Har. & M'Hen. Rep. 129.

Possession of a part is a possession of all the land covered by a party's title. *Anderson* ads. *Darboy*, 1 Nott & M'Cord's Rep. 396. *Brandon* ads. *Grimke*, ibid. 357.

Cutting a road upon land, with a view to get timber, or to fell trees in order to clear and cultivate land, constitutes, in connection with a written claim of title, a constructive possession to the whole tract described. *Spear* v. *Ralph*, 14 Vermont Rep. 400.

Where one enters into land having title, his seisin is not bounded by his actual possession, but is co-extensive with his title. But where he enters without title, his seisin is confined to his possession by metes and bounds. *Jackson ex dem. Sparkman* v. *Porter*, 1 Paine's Rep. 458. *Et vide Cluggage et al.* v. *Lessee of Duncan*, 1 Serg. & R. Rep. 111. *Davidson's Lessee* v. *Beatty*, 3 Har & M'Hen. Rep. 621.

"It is a principle of law, that he who has title to a tract of land, and is in possession of part, is in possession of the whole. A person holding land cannot occupy and use every part of his land, nor can he have every part under fence.

"It is a principle of law, that if two persons are in possession of the same land, the one by title and the other by wrong, it is his possession who has the right.

"These principles are not only established by the decisions of the court, and acquiesced in, but are founded in justice and general convenience, favor right, and resist wrong and oppression." (Per Chase, Ch. J.,) *Hammond* v. *Ridgley's Lessee*, 5 Har. & Johns. Rep. 245, 264.

whether the claim is consistent with the restrictive provisions of the Stat. 3 & 4 Wm. IV. c. 27, and secondly, whether the title is a legal or an equitable one.

The state, by virtue of its prerogative, is always seised of the lands to which it has title; and may, therefore, convey them by release, notwithstanding the intrusion of strangers upon them. *Hill* v. *Dyer*, 3 Greenl. Rep. 441.

The seisin of lands belonging to the Indian tribes, is in the sovereign, and the Indians are mere occupants. A purchaser from them can acquire only the Indian title, and they may resume it, and make a different disposition of it. An occupant under an Indian grant, the Indians having afterwards resumed the title, and granted it to the crown, was held to be a tenant at will of the king, whose occupancy no length of time could ripen into a title by adverse possession. *Jackson ex dem. Sparkman* v. *Porter*, 1 Paine's Rep. 448; *et vide Cocke's Lessee* v. *Dotson et al.*, 1 Tenn. Rep. 169; *Johnson* v. *M'Intosh*, 8 Wheat. Rep. 571, *et seq.*; *Fletcher* v. *Peck*, 6 Cranch's Rep. 142; *Jackson ex dem. Klock et al.* v. *Hudson*, 3 Johns. Rep. 384, 385.

A possession under a quit claim obtained from a *naked possessor*, without any color or claim of title, and no valuable consideration paid, is not of itself such an adverse possession as renders void a deed from the owner to a *bona fide* purchaser, executed during the continuance of such possession. *Jackson* v. *Hill*, 5 Wen. 532.

It will constitute adverse possession, for a person to enter upon land claiming title and holding exclusive possession, though done under a parol gift only. *Sumner* v. *Stevens*, 6 Metc. Rep. 337.

The occupation of pine land, by annually making turpentine on it, is such an actual possession as will oust a constructive possession by one claiming merely under a superior paper title. *Byrum* v. *Carter*, 4 Iredell, 310.

Where the defendant produces no written title, relying solely on possession, with an assertion of title, he can retain so much only as he has under actual improvement, and has been in possession of for twenty years. *Jackson* v. *Warford*, 7 Wen. 62.

The contrary of this position in *La Frombois* v. *Jackson*, 8 Cow. 589, is *obiter*. Ibid.

A possession, under a void title, does not defeat the operation of a conveyance on the ground of the premises being held adversely; for, in such case, the possession is not adverse. *Jackson* v. *Andrews*, 7 Wen. 152.

A farm is divided into two separate parts, which parts are possessed as distinct farms, for thirty years; on survey, it is ascertained that the owner of one portion has in possession twenty-two acres more than the other; held, in an action of ejectment brought to equalize the possessions, that the rights of the parties were controlled by the original division and the possessions under it; although the survey had been procured by the defendant. *Jackson* v. *Long*, 7 Wen. 170.

To constitute an adverse possession, so as to bar a recovery, or to avoid a deed subsequently executed by the true owner, the party setting up the possession must, in making entry upon the land, act *bona fide;* but, if the title be an absolute nullity, as a deed obtained by fraud or forgery, it will not serve as the foundation of an adverse possession. *Livingston* v. *Peru Iron Com.*, 9 Wen. 511.

In every case of a mixed possession, the legal seisin is according to the title. *Codman et al.* v. *Winslow*, 10 Mass. Rep. 151; *Commonwealth* v. *Dudley*, ibid. 408.

"Where two are in mixed possession of the same land, one by title and the other by wrong, the law considers him having the title as in possession to the extent of his right." Per Buchanan, J., delivering the opinion of the Court. *Cheney* v. *Ringold et al.*, 2 Harr. & Johns. Rep. 87, 94.

Firstly, as to the Stat. 3 & 4 Wm. IV. c. 27.

It will be necessary to enter somewhat largely into the several provisions of this statute, and we shall herein consider; firstly, its general

"Where two persons are in possession, the one by right and the other by wrong, it is the possession of him who is in by right." Per Chase, Ch. J., delivering the opinion of the General Court. *Hall* v. *Gitting's Lessee*, and *Gitting's Lessee* v. *Hall*, 2 Harr. & Johns. Rep. 112, 115. This case was carried to the Court of Appeals, upon cross appeals by each party, and the Court of Appeals, at December term, 1807, affirmed the opinion of the General Court on both appeals, concurring in the opinions pronounced in the several bills of exceptions. Ibid. 130.

Where two persons are in possession of land, each claiming an exclusive right, the law adjudges the rightful possession to be in the one who has the right to the land. *Mather* v. *The Ministers of Trinity Church et al.*, 3 Serg. & R. Rep. 509.

"Where two are in possession of a tract or a house, it is his possession who has the right." Per Chase, Ch. J., delivering the opinion of the Court. *Davidson's Lessee* v. *Beatty*, 3 Harr. & M'Hen. Rep. 621.

"There would appear to be no clearer principle of reason and of justice, than this, that if the rightful owner is in the actual occupancy of a part of his tract by himself, or tenant, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession. If this were not the law, the possessor by wrong would be more favored than the rightful possessor. Here are two, each in actual possession and occupation of part of a surveyed tract, the owner and an intruder. Who then is in possession of the part not occupied by inclosure by either? The man who has no right but by disseisin of a part, or he who is in the actual occupancy of a part, and the rightful owner of the whole? In this kind of mixed, constructive possession, the legal seisin is according to the title. Title draws possession to the owner. It remains until he is dispossessed, and then no further than actual dispossession by a trespasser, who cannot acquire a constructive possession, which always remains with the title." *Hall et al.* v. *Powell*, 4 Serg. & R. Rep. 465. Per Duncan, J., delivering the opinion of the Court. *Den* v. *Stephens*, 1 Dev. & Bat. Rep. 5.

"According to Lord Holt, (1 Salk. 246,) a bare entry on another, without an expulsion, makes such a seisin only, that the law will adjudge him in possession that has the right." *Smith ex dem. Teller et al.* v. *Burtis et al.*, 6 Johns. Rep. 218. Per Kent, Ch. J., delivering the opinion of the Court. *Et vide Codman et al.* v. *Winslow*, 10 Mass. Rep. 151; *Commonwealth* v. *Dudley*, ibid 408.

"Although there may be a concurrent *possession*, there cannot be a concurrent *seisin* of lands; and one only being seised, the possession must be adjudged to be in him, because he has the right." *Langdon* v. *Potter et al.*, 3 Mass. Rep. 219. Per Parsons, Ch. J., delivering the opinion of the Court.

Where surveys interfere, the act of limitations has no operation against him who has the best right, unless his opponent takes an adverse and exclusive possession. Where there is no interference, possession of part is possession of the whole. *Burns* v. *Swift et al.*, 2 Serg. & R. Rep. 436.

Where a part of a tract of land is included in A.'s deed or patent, and the same part is also included in B.'s deed or patent, and each grantee is settled upon that part of the land comprised in his deed or patent, although not upon that included in both deeds, the possession of the part included in both conveyances is in him whose deed or patent is the elder;

restrictive provisions, and secondly, the various periods from which they begin to run, in the several cases of remainder men, reversioners,

but if one of them is actually settled for seven years together upon the part comprehended in both deeds, the possession is his, and the other will be barred thereby. *Doe ex dem. Orbison* v. *Morrison*, 1 Hawk's Rep. 468.

Where one conveyed lands in fee with general warranty, and a stranger at the same time was seised in fact of part of the same land by an elder and better title, the entry of the grantee under his deed gives him seisin only of that part of which his grantor was seised; but as to the stranger, the entry of the grantee is a mere trespass. *Cushman* v. *Blanchard et al.*, 3 Greenl. Rep. 266.

A defendant in ejectment, being in possession of the land for which the suit is brought, holding the same by a claim of title adverse to that of the plaintiff for twenty years, is not necessarily entitled to a verdict: as where he holds as devisee, under a devise by a husband, of land which belongs not to himself, but to his wife. For, the will of a husband does not pass his wife's land, and no possession of the same, by a devisee, under the will, can create a presumption of title. *Bowie* v. *O'Neil et al. Lessees*, 5 Harr. & Johns. Rep. 226.

Et vide, note (A.) in the appendix, where all the decisions on the subject are collected and arranged.

For, in general, where two persons claim by the same title, there shall be no adverse possession so as to toll an entry of the one, but the entry of the other be at all times lawful." 2 Esp. Ni. Pri. 8, (old paging 434;) *Carothers et al.* v. *The Lessee of Dunning et al.*, 9 Serg. & R. Rep. 386.

Purchasers under the same title, without partition, cannot prescribe against each other, by the lapse of ten years. *Broussard* v. *Duhamel*, 3 Martin's Rep. N. S. 11.

To constitute an adverse possession, there must be a possession under color and claim of title; but Beekman's entry, claiming as tenant in common under the same title as that of the lessors of the plaintiff, qualified his entry, and admitted the title of the lessors; so that neither Beekman nor the defendants, (they claimed title under Beekman,) could set up that entry as adverse to the common title, or as injurious to the rights of the other tenants in common." *Smith ex dem. Teller et al.* v. *Burtis & Woodward*, 9 Johns. Rep. 179, 180. And to the same purport, vide *Jackson ex dem. Fisher* v. *Creal & Kellogg*, 13 Johns. Rep. 116; *Jackson ex dem Sinsabaugh et al.* v. *Sears*, 10 Johns. Rep. 435; *Jackson ex dem. Stevens* v. *Stevens*, 16 Johns. Rep. 116; *Jackson ex dem Corson & Sebring* v. *Cairns & Coles*, 20 Johns. Rep. 301.

In *Jackson ex dem. Hill* v. *Streeter*, (5 Cow. Rep. 530, 531,) Sutherland, J., delivering the opinion of the court, said: "I do not understand the judge as having excluded the patent to Miles; but only as deciding that the patent itself, without other evidence, would not show a subsisting title out of the lessor of the plaintiff. In this, I apprehend, he was correct. The plaintiff had shown a deed for the premises in question from Buck to John Streeter, in September, 1798: that Streeter went into possession under the deed, and continued in possession until his death, nineteen or twenty years before the trial, leaving four children; (the interest of two of them being owned by the lessor;) and that the defendant, Benjamin, one of the children, has been in possession ever since. This was a good adverse possession against the patent granted in 1790.

"The evidence that Buck, who gave the deed to John Streeter, had no title, was properly rejected on several grounds. John Streeter was the common source of title to both parties. His children, there being no will, are presumed to have taken the premises by descent, as tenants in common. It is not for the defendant to say that the common ancestor had no title, and that his possession is not as tenant in common, but in his own individual right."

issue in tail, personal representatives, mortgagees, ecclesiastical persons, and persons under legal disabilities: premising that in order to pre-

In the case of *Den ex dem. Midford et ux.* v. *Hardison*, (3 Murph. Rep. 166,) Taylor, Ch. J., delivering the opinion of the court, said: "As an adverse possession alone will not take away a right of entry, neither will it, when under a title which is common to the plaintiff and defendant; the intendment of law being, in such case, that the defendant's entry was for the benefit of all entitled as co-heirs. Where both parties claim by descent from the same common ancestor, a color of title, by virtue of such descent, cannot be set up by one against the other, whatever may be the effect of a descent in any other case, which the court does not decide." Et vide, *Witham* v. *Perkins*, 2 Greenl. Rep. 400.

A person coming into possession under a will, cannot obtain a right by possession adversely from others claiming under the same will: possession as to them is fiduciary. *Vaux, executor, &c.* v. *Nesbit et al., executors, &c.*, 1 M'Cord's Ch. Rep. 352, 360.

In *Gay* v. *Moffit*, (2 Bibb's Rep. 506, *et seq.*,) the opinion of the court was delivered by Judge Logan, who said: "This was an action of ejectment, in which the appellant, who was the defendant below, relied on his adverse possession for twenty years.

"One of the grounds opposed to this possessory right is an agreement, by which the defendant, after his entry on the land, had purchased the same from the plaintiff, agreeing therein to pay rent upon certain contingencies."

Where one claims under or through the other, there shall be no adverse possession in such case sufficient to give a title. Nor does it seem to vary the rule that such claim was acquired posterior to the entry on the land. For where a cottage built in defiance of a lord, and quiet possession of it for twenty years, was held to be within the statute; yet it was ruled, that if it had been built at first by the lord's permission, or any acknowledgment had since been made, the statute would not run against the lord. And although the reason there assigned is, that the possession of a tenant at will works no disseisin; still the principle is the same, to stop the running of the statute by the acknowledgment or agreement subsequently made; thereby converting an adverse hostile possession into a friendly possession, claiming protection under the same right, but the tenure thus conferred seems unimportant with respect to the effect produced on the running of the statute; for whether it be at will, for a term of years, or for a greater estate, is deemed totally immaterial. See Esp. 435; Bull. N. P. 104.

"This doctrine seems also to be supported in the case of *Brandt* v. *Ogden*, decided by the Supreme Court in New York, (1 Johns. Rep. 157.) In that case it is said that, in order to bar the recovery of the plaintiff, who has title by a possession in the defendant, strict proof has always been required, not only that the first possession was taken under claim hostile to the real owner, but that such hostility has existed on the part of the succeeding tenants. The operation of the statute in such case seems to cease against a claim purchased or brought in aid of the protection of the possession. A claim thus recognized and brought in to protect the possession cannot be adverse and hostile to it. And when, in general, persons claim by the same title, there shall be no adverse possession so as to toll the entry, but the entry of the other be at all times lawful. Esp. 434. Co. Litt. 242, 296.

"If, therefore, we consider the appellant as having no other title than that derived from possession, and that his possession has been changed from an adverse hostile into a friendly possession, it follows that the statute of limitations does not apply to his case."

But to change the character of a possession from adverse to amicable, some agreement legally obligatory must be made, acknowledging the title of the plaintiff; a mere verbal agreement to buy in an overhanging title will not stop the running of the statute of limitations. *Daniel* v. *Ellis et al.*, 1 Marsh. Rep. (Ky.) 60.

vent needless repetition, the word "claimant" will be used to denote the "person claiming the land and the persons through whom he

And in the case of *Briscoe's heirs* v. *M'Gee et al*, (1 Marsh. Rep. (Ky.) 190,) Owsley, J., delivering the opinion of the court, said, "And as the plaintiff, Parmenias Briscoe, is proven to have entered upon and taken possession of the land in contest, in company with and by the direction of his father, Gerard Briscoe; and as the possession appears also to have been taken under the claim of Gerard Briscoe, then actually surveyed, the possession so taken, we are of opinion, should be considered adverse to that of the defendant in error, although Parmenias, by a contract with a certain Inlow, to whom it is shown the defendant had previously sold his claim to the land, purchased and paid him for the improvement made upon the land."

Where both the plaintiffs and defendants claim under the same right, the plaintiffs are not bound to trace back their title beyond the person holding that right. If there be an adverse right, it lies in the defendant to show it. *Riddle* v. *Murphy*, 7 Serg. & R. Rep. 230.

A defendant in ejectment, who makes title under the same survey as the plaintiff, cannot object that it was made on a shifting location, or say anything against it. *Powers* v. *M'Ferran*, 2 Serg. & R. Rep. 44.

As to the practical proceedings under the Revised Statutes of New York, relative to compelling the determination of claims to real property, see *Tanner* v. *Tibbitts*, 18 Wen. 544. *Platt* v. *Torrey*, ib. 572.

In the case of *Jackson ex dem. Bowen* v. *Burton*, (1 Wen. Rep. 343,) the court (per Sutherland, J.,) said, "The defendant, on the 24th January, 1801, conveyed the premises in question by a warrantee deed to Benjamin Bowen. By that conveyance all the right and title which the defendant then had in the premises, had passed to his grantee; and even any title subsequently acquired would have enured to his benefit. Although the defendant remained in possession after the conveyance, it was not as owner, but as tenant to his grantee, and nothing but a clear, unequivocal, and notorious disclaimer of the title of his landlord could render his possession, however long continued, adverse."

The non-claim by a grantee of an interest in land for a period of thirty-four years, after acquiring title, is, in an action against the heir of the grantor, no bar to a recovery; nor does the exclusive possession of the land by the grantor and his heirs for that length of time afford *per se* the presumption of a re-conveyance or surrender of the interest conveyed, as long as the nature of the possession is consistent with the rights of the grantee. *Butler* v. *Phelps*, 17 Wen. 662.

Where the defendant's possession was consistent with every existing claim, it was held, that it "could be adverse to none." *Beach* v. *Catlin*, 4 Day's Rep. 295. And to the like effect, *vide Barr* v. *Gratz's heirs*, 4 Wheat. Rep. 213. *Fraser et al.* v. *M'Pherson et al.*, 3 Eq. Rep. (Desaus.) 408. *Witham* v. *Perkins*, 2 Greenl. Rep. 400.

The uninterrupted use, for a long period, of part of a turnpike not traveled over, does not confer a right of possession adverse to the proprietor of the soil. *Parker* v. *Inhabitants of Farmingham*, 8 Metc. Rep. 260.

In the case of *Thayer, Assignee, &c.*, v. *Cramer et al.*, (1 M'Cord's Ch. Rep. 395, 397,) the court, per Nott, J., said, "In this case, it is the opinion of the court, that the decree of the chancellor ought to be affirmed. Mrs. Gibbes is the only appellant, and the ground on which she relies is, that having been five years in possession, she is protected by the statute of limitations. A mortgage of land in this state does not convey a fee, even after the time of redemption is past; the legal title still remains in the mortgagor, and the land is only considered as a pledge to receive the payment of the money. The mortgagor must, therefore, be considered as a trustee for the mortgagee, and cannot be considered as hold-

claims;" the word "rights," the "right to make an entry or bring an action to recover the land;" the word "estate," "any estate or inte-

ing adversely. And a purchaser, having a knowledge of the trust, places himself in the same situation, making himself thereby a trustee. *Murray* v. *Ballou*, 1 Johns. Ch. Rep. 575. 3 Vern. 271. 2 Fonbl. 152. The act requiring mortgages to be recorded was for the purpose of giving notice to creditors and subsequent purchasers. And as the mortgage in this case was recorded, we must consider the defendant as a purchaser with notice, and as holding subject to that incumbrance.

"The possession of the mortgagor, or those claiming under him, is not adverse to, but is compatible with the rights of the mortgagee." The statute of limitations does not apply to such a case. *Higginson* v. *Mein*, 4 Cranch's Rep. 419. *Et vide Jackson ex dem. Dox* v. *Jackson*, 5 Cow. Rep. 174.

No debtor, nor mortgagor, can set up an adverse possession against his creditors, or the mortgagee. (Per Desaussure, Ch.,) *Fraser et al.* v. *M'Pherson et al.*, 3 Eq. Rep. (Desaus.) 408.

The possession of the tenant for life is not adverse to, but consistent with the title of the reversioner in fee. *Banks, Admr.* v. *Marksberry*, 3 Littell's Rep. 282.

In the case of *Kirk et al.* v. *Smith ex dem. Penn*, in error, (9 Wheat. Rep. 241, 288,) Marshall, Ch. J., delivered the opinion of the Court; in speaking of "those rules which apply to acts of limitation generally," he said: "One of these, which has been recognized in the Courts of England, and in all others where the rules established in those courts have been adopted, is, that possession, to give title, must be adversary. The word is not, indeed, to be found in the statutes; but the plainest dictates of common justice require that it should be implied. It would shock that sense of right which must be felt equally by legislators and by judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title. Several cases have been decided in this Court, in which the principle seems to have been considered as generally acknowledged; and in the state of Pennsylvania, particularly, it has been expressly recognized. To allow a different construction would be to make the statute of limitations a statute for the encouragement of fraud—a statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such construction."

Where two non-residents held in common an unsettled tract of land, which, without their knowledge, was sold for non-payment of the state taxes; and they afterwards made partition by mutual deeds of release and quit claim, in common form; after which one of them, within the time of redemption, paid the tax to the purchaser at the sheriff's sale, from whom he took a deed of release and quit claim to himself alone for the whole tract;—it was held that this payment and deed enured to the benefit of them both; that the party paying, had his remedy by action against the other for contribution; and that he who had not paid, might still maintain a writ of entry against the other, for his part of the land. *Williams* v. *Gray*, 3 Greenl. Rep. 207.

Where the tenant by the curtesy of an undivided portion of an estate had abandoned the land for more than forty years, leaving it in the possession of another tenant in common, whose occupancy was an ouster; it was held that the reversioner of such undivided portion of the estate had no right of entry upon the tenant in possession, during the life of the tenant by the curtesy, his abandonment of the land being no forfeiture of the estate. *Witham* v. *Perkins*, Greenl. Rep. 400.

A., being seised in fee of an undivided moiety of an estate, devised the same (by will made some years before her death,) to her nephew and two nieces, as tenants in common; one of the nieces died in the lifetime of A., and left an infant daughter. A., by another will, intended

rest;" the words "future estate," any "estate or estates or interest in reversion or remainder, or any other future estate or interest;" and

to have devised the moiety to the nephew and surviving niece, and the infant daughter of the deceased niece, but this will was never executed. After A.'s death, the nephew and surviving niece covenanted to carry the executed will into execution, and to convey one-third of the moiety to a trustee, upon trust to convey the same to the infant if she attained twenty-one, or to her issue if she died under twenty-one, and left issue: or otherwise to the nephew and niece in equal moieties. No conveyance was executed in pursuance of the deed. The rents of the third were received by the trustee for the use of the infant during her life-time. An ejectment having been brought by the devisee of the nephew, more than twenty years after his death, but less than twenty years after the death of the infant; it was *held*, that there was no adverse possession until the death of the infant, and that the ejectment was well brought. *Doe ex dem. Colclough et ux.* v. *Hulse*, 2 Barn. & Cress. Rep. 757.

A conveyance in fee having been shown from the original proprietor of a tract of land, the grantees will be presumed to have entered into possession; and whoever is in possession will be presumed to hold for them, and in subordination to their title, until the contrary appears. So ruled in a case where the claim to recover was made under a conveyance executed fifty-five years before suit brought. *Doe ex dem. Marston et al.* v. *Butler*, 3 Wen. Rep. 149.

Where a person entered into the possession of land belonging to his father-in-law, who promised to give the lot to him and his wife; but subsequently, by will, devised the same to the wife; it was *held*, in action of ejectment brought by the heirs of the wife against the grantee of the husband, (he having been in possession thirty-six years, claiming the lot as his own under a conveyance from the husband,) that his possession was not adverse, and that a conveyance to the husband from his father-in-law could not be presumed. *Jackson ex dem. Haverly et ux.* v. *French*, 3 Wen. Rep. 337.

Where a grantee under a conveyance from a tenant by the curtesy of a house and lot, goes into possession of the lot and of an alley adjoining the same, which had been used for thirty years by the owners of the lot as appurtenant thereto; continues in possession himself nine years, and then acquires title to the alley from a third person, he cannot set up such title as adverse in an action of ejectment brought by the heir to recover the premises as the inheritance of his mother, the action having been brought within twenty years after the termination of the life estate. *Jackson ex dem. M'Crea* v. *Mancius et al.*, 2 Wen. Rep. 357.

Where A. entered into possession of land in 1770, and in 1786 received a deed from his father and mother for the land, but which was not acknowledged by the mother, to whom the title belonged by inheritance: it was *held*, that the acceptance of the deed was sufficient to repel the parol evidence that A. entered adversely to his mother's title; or if his possession had been adverse to that time, it ceased to be so on accepting the deed; and he was deemed to hold under the deed such interest as his father held, that is an estate for life; and that on the death of the father, the estate reverted to the mother or her heirs. *Jackson ex dem Sinsabaugh et al.* v. *Sears*, 10 Johns. Rep. 435, 441; cited and confirmed in *Jackson ex dem. Stevens* v. *Stevens*, 16 Johns. Rep. 116; and *Jackson ex dem. Corson & Sebring* v. *Cairns & Coles*, 20 Johns. Rep. 301.

In *Jackson ex dem. Stevens* v. *Stevens*, (16 Johns. Rep. 116,) Spencer, J., who delivered the opinion of the Court, said; "It was objected that the deed from Briggs and wife to Ebenezer Stevens was void, on the ground that Samuel Stevens held adversely. It will be observed, that he was dead when this deed was given, and that Ebenezer Stevens had succeeded as tenant in common with his widow, under the will, to an undivided portion of the estate:

the word "possession," "the possession or receipt of the rents or profits of the land, in respect of which the claim is made."

Firstly, as to the general restrictive provisions of the statute.

The second section provides, that after December 1, 1833, no person shall make an entry, or bring an action to recover any land, "but within twenty years next after the time at which the right to make such entry or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued through any person through whom he claims, then within twenty years next after the time at which the right to make such entry, or to bring

and it may well be doubted whether a deed which he took when actually entitled to a part of the estate can be said to be adverse. But there is another decisive answer: Samuel Stevens accepted a deed from Briggs and his wife, and he held under it such a right as the deed conveyed. That the right was only the interest which Briggs had in the premises, as his wife never acknowledged the deed until several years after the death of Samuel Stevens; Briggs' interest was an estate for life, *jure uxoris*. The possession of Samuel Stevens was not then adverse to the right of Briggs' wife." 10 Johns. Rep. 441.

In the case of *Jackson ex dem. Carson et al.* v. *Cairns et al.*, (20 Johns Rep. 301,) Ryers had remained in possession of his wife's lands, many years after her death, claiming it as his own, building upon it and improving it. He, at length, mortgaged it; and, the land, being sold, after his death, upon a foreclosure of that mortgage, was purchased by the defendant, Cairns; against whom the heirs at law of Mrs. Ryers commenced an action of ejectment. Spencer, Ch. J., delivering the opinion of the Court, after deciding that Ryers was but a tenant at sufferance, and that his possession was not adverse, said: "We perceive, then, that Ryers' continuance in possession, after the termination of the estate he held in right of his wife, was a tenancy at sufferance, not tortious as regarded the true owners, and consequently not hostile or adverse to their right. His claim of title, and building on the premises, can have no effect; for, it does not appear that this was ever brought home to the knowledge of the lessors. I do not mean to admit, that had the claim been known to them, that a mere claim of title by a tenant at sufferance would create a disseisin, or a possession adverse to the true owner. It is unnecessary to decide upon the operation of the mortgage by Ryers to Waln, in 1800, or whether that constituted an adverse possession, although I am of opinion it did not; and that there never was an adverse possession until Cairns' entry, subsequent to the sale, in 1805.

"I have been more particular in stating the reasons of the decision of the Court, in this case, than was necessary, as all the principles were decided by this Court upon a state of facts between the same lessors and Cairns, on a former occasion, but that decision was not reported. We then decided, that Ryers' continuance in possession was not adverse, and that the lessors were not barred by the statute of limitations."

An administrator in possession of lands, of which his intestate died seised and possessed, does not hold adversely to the right of his intestate, and cannot acquire a title in his own right, by the statute of limitations. *North* v. *Barnum*, 12 Verm Rep. 205.

such action shall have first accrued to the person making or bringing the same."[1]

[1] This statute appears to be the model after which the statutes of limitations, in most of the states of the American Union, have been framed. The *times* of limitations, however, are variant in many of the states. The following is a summary of the provisions as to rights of entry, and actions for the recovery of land:

ALABAMA.

1. No entry to be made into lands but within twenty years after right of title accrued.

2. Real, possessory, ancestral, mixed, or other actions for lands, to be commenced within thirty years next after the right of title thereto, or cause of action accrued.

Proviso. That the time during which the person who has such a right of entry or of action, shall have been under twenty-one years of age, *feme covert*, or insane, shall not be computed part of the period of limitation.

The proviso to the 7th section of the act of 1802, limiting the "right or title of entry upon any lands," &c., which declares, "that the time during which the person who hath or shall have such right or title of entry, shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the same limited period of twenty years," does not except from the operation of the statute, a disability occurring after the statute has begun to run. It applies to a disability existing at the time the right accrued; and if that disability be once removed, the time must continue to run notwithstanding any subsequent disability, either voluntary or involuntary. *Doe ex dem. Caldwell* v. *Thorpe*, 8 A. R. 253.

The action of ejectment is barred by an adverse possession of twenty years, unless the plaintiff can bring himself within some of the savings of the proviso of the act forbidding an entry into lands after twenty years. *Doe ex dem. Hallet et al.* v. *Forest et al.*, 8 A. R. 264.

A possession acquired under color of title, and acquiesced in, for twenty years, will bar a recovery in ejectment, although, during a portion of the time, the plaintiff in ejectment was prosecuting an application to congress for the confirmation of an imperfect title, derived from the crown of Spain, to a tract of land within which the land sued for was situate, and to which his title was finally confirmed, he having been in possession anterior to the alleged intrusion. Ibid.

CONNECTICUT.

"An act for the limitation of civil actions, and of criminal prosecutions." Revision of 1821, title 59. Limitations.

1st section enacts, that no person shall make entry into lands, &c., but within fifteen years next after his right or title shall first descend or accrue to the same. And no such entry shall be sufficient, unless an action shall be commenced thereupon and prosecuted with effect, within one year next after the making thereof.

Proviso, in favor of any person who "at the time of the first descending or accruing of the said right or title," is an infant, *feme covert*, lunatic, or prisoner, "so as such person shall, within five years next after full age, discoverture, coming of sound mind, enlargement out of prison, or the heirs of such person, shall, within five years after the death of such person, bring such action or make such entry, and take benefit of the same."

In the construction of this act, it is declared by section 3, that the right to make such entry or bring such action, is deemed to have first

DELAWARE.

Act of 16th June, 1793. Laws, vol. 2, p. 1155, ch. 40, sec. 1.

Sec. 1 enacts, That no person shall make entry into lands, &c., but within twenty years after his right or title first descended or accrued. Nor shall any person have any writ of right or any action, real, personal, or mixed, for, or make any prescription to, or in any lands, &c., but only upon an actual seisin or possession of himself, his ancestor, or predecessor, within twenty years next before suit brought. "Provided, nevertheless, that any person or persons now having right or title of entry, and the heirs of such person or persons, may, within ten years from this time, proceed as might have been done heretofore: And provided also, that if any person, having right or title of entry, was and now is, or if any person hereafter having right or title of entry, shall be, at the time such right or title first descended or accrued, an infant, *feme covert*, *non compos mentis*, or a prisoner, then, but in no other case whatever, except as before provided, such person, or the heirs of such person, may, within ten years next after the removal of such disability, but not afterwards, proceed, notwithstanding the said twenty years be expired, as might have been done before the same were expired, and if any such person shall die under any of the disabilities aforesaid, the heirs of such person shall have the like benefit that such person might have had by living till the disability had ceased."

Act of 2d February, 1811. 4th vol. 459, 453, ch. 158.

Sec. 22 repeals all savings in favor of persons beyond sea, or out of the state, and enacts, That they shall bring their actions within the same times as other persons for whom no saving is given.

GEORGIA.

Limitations of all suits for real estate and the entry on lands, seven years after title and cause of action shall accrue. Hotch. St. Law of Geo. 539.

Proviso, saving the rights of infants, *feme covert*, persons *non compos*, imprisoned and beyond seas.

ILLINOIS.

(First session, third General Assembly; Act of February 18, 1823.)

Limitation of "action of ejectment, writ of right, or other action for the recovery of any lands, &c., and of any avowry or cognizance thereof, ten years."

Proviso, saving to infants, *femes covert*, persons insane or imprisoned, their right, so as they or their heirs commence their actions within five years after disability removed.

In case of disseisin, descent cast will not toll right of entry without ten years peaceable possession.

INDIANA.

No statutory provision on the subject of real actions. Limitations in actions of ejectment, twenty years.

KENTUCKY.

Limitation of writs of right upon the seisin or possession of the ancestor or predecessor of the demandant, fifty years.

accrued according to the following rules, that is to say: where the claimant has, in respect of the estate claimed, been in possession, and

Any other possessory action upon the possession or seisin of the ancestor or predecessor of demandant, forty years.

Any real action upon the demandant's own possession or seisin, thirty years.

And there are no savings in favor of infants or any others.

Limitations of writs of *formedon* in descender, remainder, reverter, twenty years.

Of entry into lands, twenty years.

Proviso, saving the rights of infants, *femes covert*, persons *non compos mentis*, or imprisoned, and their heirs; so as they bring and maintain their action, or make their entry within ten years next after such disabilities removed, or the death of the person so disabled. Persons "not within this commonwealth," were also originally included in the saving, until the act of January 22, 1814.

An act passed February 9, 1809, commonly called the "ten years act," bars claims after ten years, where the claim is set up under or by an adverse interfering entry, survey, or patent against one who had actually settled thereon (the premises) before the passage of the act, and to which, at the time of settlement, such person had a connected title in law or equity deducible from the commonwealth. And where such title is acquired after the settlement made, the limitation is to run from the time of such acquirement; and where possession acquired; and possession acquired as above, has been transmitted by sale or other legal act of conveyance, the purchaser, &c., is entitled to the same benefit of the act to which the vendor was entitled.

Exceptions. This act shall not extend to infants, *femes covert*, or to persons of unsound mind; nor to persons out of the United States, in the service of the United States, or this state; but such persons have seven years within which to sue after the disability removed, or after the expiration of their employments beyond the limits of the United States; and where the limitations shall have begun to run, and the right or title shall, by the act of God or the operation of law, be cast upon any person within the time of such disabilities and exceptions, the time of such disability or privilege shall not be computed as part of the limitation.

By an act of January 22, 1814, it is declared, that persons whose causes of action accrue while they are out of this commonwealth, shall, by the courts of the same in every description of action relating to the title or possession of land, be considered in the same light and no other or better than the citizens of this commonwealth.

And that *femes covert*, upon whom lands have descended, or to whom they shall have been devised by will during coverture, and in no other case, shall be allowed three years only after discoverture; and infants, and persons *non compos mentis* only, three years, after the disabilities removed.

The time between April 12, 1774, and April 12, 1778; and between January 1, 1781, and January 1, 1782; and between May 5, 1783, and October 20, 1783, are not to be accounted in any case as part of the period of limitations.

LOUISIANA.

This state has, properly speaking, no statute of limitations; the law of "prescription" in use in this state is derived from the civil law, and differs from the English and American statutes in this, that while those statutes only bar the remedy of the true owner, without extinguishing his right; the law of prescription of Louisiana bars both remedy and right; and, moreover, vests a right in the occupant, however wrongfully his possession may have

while entitled thereto been dispossessed, or discontinued such possession, then such right shall be deemed to have first accrued at the time of such

been acquired. The following extracts from the "Civil Code of the state of Louisiana," indicate the difference between it and the several statutes of limitations in force in this country and in Great Britain.

TITLE 23, CHAPTER 2.

"Art. 3414. The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be, in fact; as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another."

"Art. 3415. The possessor in bad faith is he who possesses as master, but who assumes this quality, when he well knows that he has no title to the thing, or that his title is vicious and defective."

TITLE 23, CHAPTER 3, SECTION 1.

"Art. 3420. Prescription is a manner of acquiring property, or discharging debts, by the effect of time, and under the conditions regulated by law.

"Each of these prescriptions has its special and particular definitions."

"Art. 3421. The prescription by which property is acquired, is a right by which a mere possessor acquires the property of a thing which he possesses, by the continuance of his possession during the time fixed by law."

"Art. 3422. The prescription by which debts are released, is a peremptory and perpetual bar to every species of action, real or personal, when the creditor has been silent for a certain time without urging his claim."

TITLE 23, CHAPTER 3, SECTION 2. § 1.

"Art. 3450. By the term *just title*, in cases of prescription, we do not understand that which the possessor may have received from the real owner, for then no prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the property."

"Art. 3451. And in this case, by the phrase *transfer the property*, we understand not such a title as shall have really transferred the property, but a title which, by its nature, would have been sufficient to transfer the property, provided it had been derived from the real owner, such as a sale, exchange, legacy, or donation.

"Thus, prescription could not be acquired under a lease or loan, because these contracts do not transfer the property."

"Art. 3452. It is necessary besides:

"1. That the title be valid in point of form; for if the possession commenced by a contract void in that respect, it cannot serve as a foundation for prescription.

"2. That the title be certain; thus, every possessor who cannot fix exactly the commencement of his possession, can prescribe.

"3. That the title be proved; for, as it is created by deed, it is not presumed, and every man who founds his title on an act must produce it, or prove the contents if it be lost."

dispossession, or discontinuance of possession, or at the last time at which any profits were received; and where the claimant shall claim the es-

TITLE 23, CHAPTER 3, SECTION 2.

"Art. 3435. The time necessary to prescribe for property is different, whether the property be immovable, slaves, or movable.

"Art. 3436. The property of immovables and slaves is acquired by a longer or shorter time, according as the possessor has been in good or bad faith, as laid down in the following paragraph.

"Art. 3437. Immovables are prescribed for by ten years between persons present, and twenty years between absentees, when the possessor has been in good faith, and held by a just title during that time.

"Art. 3438. The same species of property is prescribed for by thirty years without any title on the part of the possessor, or whether he be in good faith or not."

MAINE.

SEC. 1. No person shall commence any real or mixed action for the recovery of lands, or make an entry thereon, unless within twenty years after the right to make such entry, or bring such action, first accrued; or within twenty years after he, or those under or from whom he claims, shall have been seised or possessed of the premises; except as hereinafter provided.

SEC. 2. If such right or title first accrued to an ancestor or predecessor of the person who brings the action or makes the entry, or to any other person from, by, or under whom he claims, the said twenty years shall be computed from the time when the right or title so first accrued to such ancestor, predecessor, or other person.

SEC. 3. In the construction of this chapter, the right of entry, or of action to recover land, shall be deemed to have first accrued at the respective times hereinafter mentioned:

I. When a person shall be disseised, his right of entry shall be deemed to have accrued at the time of such disseisin.

II. When he claims, as heir or devisee of one who died seised, his right shall be deemed to have accrued at the time of such death, unless there is a tenancy by the curtesy or other estate, intervening after the death of such ancestor or devisor; in which case, his right shall be deemed to accrue, when such intermediate estate shall expire, or when it would have expired, by its own limitation.

III. When there is such an intermediate estate, and in all cases, when the party claims by force of any remainder or reversion, his right, so far as it is affected by the limitation herein prescribed, shall be deemed to accrue, when the intermediate estate would have expired by its own limitation, notwithstanding any forfeiture thereof, for which he might have entered at an earlier time.

SEC. 4. The preceding clause shall not prevent any person from entering, when entitled to do so, by reason of any forfeiture or breach of condition; but, if he claims under such a title, his right shall be deemed to have accrued, when the forfeiture was incurred, or the condition broken.

SEC. 5. In all cases not specially provided for, the right of entry shall be deemed to have accrued, when the claimant, or the person under whom he claims, first became entitled to the possession of the premises under the title, upon which the entry or action is founded.

SEC. 6. If any minister or other sole corporation shall be disseised, any of his successors may enter upon the premises, or may bring an action for the recovery of them, at any time

tate of some deceased person, who shall have continued in such possession until the time of his death, and shall have been the last person

within five years after the death, resignation, or removal of the person disseised, notwithstanding the twenty years after the disseisin shall have expired.

Sec. 7. If, at the time when such right of entry, or of action upon or for any lands, shall first accrue, the person entitled to such entry or action shall be within the age of twenty-one years, or a married woman, insane, imprisoned, or absent from the United States, such person, or any one claiming from, by, or under him, may make the entry, or bring the action at any time within ten years after such disability shall be removed, notwithstanding the twenty years, before limited in that behalf, shall have expired.

Sec. 8. If the person first entitled to make such entry or bring such action, shall die during the continuance of any of the disabilities mentioned in the preceding section, and no determination or judgment shall have been had of or upon the title, right, or action which accrued to him, the entry may be made, *on* [or] the action brought by his heirs, or any other person claiming from, by, or under him, at any time within ten years after his death, notwithstanding the said twenty years shall have elapsed; but no such further time for making such entry, or bringing such action, beyond what is hereinbefore prescribed, shall be allowed, by reason of the disability of any other person.

Sec. 9. When a tenant in tail, or a remainder man in tail, shall die, before the expiration of the period hereinbefore limited for making any entry, or bringing an action for lands, no person claiming any estate, which such tenant in tail or remainder man might have barred, shall make an entry or bring an action to recover such land, but within the period during which the tenant in tail or remainder man, if he had so long lived, might have made such entry, or brought such action.

Sec. 12. No real or mixed action, for the recovery of any lands, shall be commenced by or on behalf of the state, unless within twenty years from and after the day on which this chapter shall become a law, or within twenty years next after the time of the accruing of the title to the state. (Rev. Sts. of Maine, ch. 147.)

MARYLAND.

The statute of limitations of 21 Jac. 1, c. 16, has been adopted as law in Maryland; but the statute of 32 Henry 8, ch. 2, has not.

By an act passed February, 1819, the exceptions in favor of "persons beyond seas," is *repealed* in every case.

MASSACHUSETTS.

(*Act of March 2d*, 1808.)

Limitations of real actions; writ of right, upon the possession or seisin of the demandant's ancestor or predecessor; forty years.

Writ of entry, upon disseisin or demandant's ancestor or predecessor; or any action possessory upon possession of demandant's ancestor or predecessor; thirty years.

Any action upon demandant's own seisin or possession; thirty years. Act of July 4th, 1786.

Writs of *formedon*, in descender, remainder, or reverter; twenty years:—And the same limitation of entry into lands.

"Provided always, that when any person that is or shall be entitled to any of the writs of *formedon* aforesaid; or to any entry into lands, tenements, or hereditaments, shall, at the

entitled to such estate who shall have been in such possession, then such right shall be deemed to have first accrued at the time of such

time the said right or title first descended, accrued, or fell, be within the age of twenty-one years, *feme covert, non compos,* imprisoned, or beyond seas, or without the limits of the United States, that then such person shall and may bring such suit, or make such entry, at any time within ten years after the expiration of twenty years aforesaid, and not afterwards."

Where an action is commenced for the recovery of land, which the tenant in possession or those "under whom he claims has had an actual possession for the term of six years or more, before the commencement of such action, the jury which tries the same, if they find a verdict for the demandant, shall (if the tenant request the same) also inquire, and, by their verdict, ascertain the increased value of the premises, at the time of trial, by virtue of the buildings and improvements made by such tenant, or those under whom he may claim;" and, (if the demandant shall require it) what would have been the value of the demanded premises, had no buildings or improvements been made by such tenant or those under whom he may claim," and the demandant may then, "during the term in which such verdict may be given," "make his election on record in open court, to abandon the demanded premises to the tenant, at the price estimated by the jury as aforesaid;" but, if the demandant shall not make such election, no writ of seisin or possession shall issue in his favor, unless he shall, within one year, have paid into the clerk's office or otherwise as the Court may appoint, "such sum, with the interest thereof, as the jury shall have assessed, for buildings or improvements as aforesaid." Acts of March 2, 1808; March 2d, 1810; and February 22d, 1820.

MISSISSIPPI.

Every action, of whatever kind, for the recovery of lands, tenements, and hereditaments, must be brought within thirty years after the title accrues.

Proviso, saving the rights of infants, insane persons, and *femes covert.*

MISSOURI.

Limitations of actions for real property.

All actions of whatever kind or description, for any lands, tenements, and hereditaments, are limited to twenty years; and every entry into lands must be made within twenty years after the title to the same first descended or accrued. Act of 21st February, 1825, sec. 2.

Persons "within the age of twenty-one years, *feme covert, non compos mentis,* imprisoned, beyond seas, or without the limits and jurisdiction of the United States of America," may bring action, or make entry, within twenty years after the disabilities removed; "and, in case such person or persons shall die within the said term of twenty years, or under any of the disabilities aforesaid, the heir or heirs of such person or persons, shall have the same benefit that such persons would or might have had by living until their disabiltties should have ceased or been removed." Ibid. sec. 3.

Claims against the state, for escheated lands, must be made within five years; "saving, however, to infants, married women, and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petitions as aforesaid, at any time within five years after their respective disabilities are removed." Act of December 18th, 1824, sec. 9.

death; and where the claimant shall claim in respect of an estate in possession, in any manner assured by any instrument (other than a will)

NEW HAMPSHIRE.

Limitation of actions for real property.

No person can maintain any action, for the recovery of lands, unless upon a seisin within twenty years.

There is a saving of five years, after disability removed, to such as were, at the time the right or title descended or accrued to them, either under twenty-one years of age, *feme covert*, *non compos mentis*, imprisoned, or without the limits of the United States.

NEW JERSEY.

(*Act for the Limitation of Actions, passed 7th February*, 1799.)

Sec. 10. "And be it enacted, That, from and after the first day of January, which will be in the year of our Lord, one thousand eight hundred and three, every real, possessory, ancestral, mixed, or other action, for the lands, tenements, or hereditaments, shall be brought or instituted within twenty years next after the right or title thereto, or cause of such action shall accrue, and not after: Provided always, that the time, during which the person hath or shall have such right or title, or cause of action, shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the said limited period of twenty years."

"Sec. 9. Limits the time of entry into lands, &c., to twenty years; but with the same *proviso* as contained in section 10."

"Sec. 11. *And be it enacted*, that if a mortgagee and those under him, be in possession of the lands, tenements and heriditaments contained in the mortgage or any part thereof, for twenty years after the default of payment by the mortgagor, then the right or equity of redemption therein shall be forever barred."

"Sec. 13. Limits suits by the state, for land, *twenty years*."

NEW YORK.

The existing law of limitations of New York, relative to real estate, will be found in part 3, chap, 4, tit. 2, art 1; in secs. 32 and 45, of art. 4, and in part 2, chap. 1, tit. 3, sec. 18, of the Revised Statutes. Vol. 2, pp. 292, 298, 300; vol. 1, p. 742.

"Sec. 1. The people of this state will not sue or implead any person for or in respect to, any lands, tenements or heriditaments, or for the issues or profits thereof, by reason of any right or title of the said people to the same, unless,

"1. Such right or title shall have accrued within twenty years before any suit or other proceeding for the same shall be commenced; or unless,

"11. The said people, or those from whom they claim, shall have received the rents and profits of such real estate, or of some part thereof, within the said space of twenty years."

"It cannot be objected, in an action of ejectment, in which the people are plaintiff, that the suit is prosecuted without the knowledge or permission of the attorney general." *The People* v. *Dennison*, 17 Wen. 312.

"Sec. 2. The last preceding section shall not extend to any suit or prosecution for, or in respect to, any liberties or franchises."

"Sec. 3. No action shall be brought for or in respect to any lands, tenements or hereditaments, by any person claiming by virtue of any letters patent, or grants from the people of

to him, or some person through whom he claims, by a person being in respect of the same estate in possession, and no person entitled under

this state, unless the same might have been commenced by the people of this state, as herein specified, in case such patent or grant had not been issued or made."

"Sec. 4. When letters patent, or grants of any lands or tenements, shall have been issued or made by the people of this state, and the same shall be declared void by the decision or decree of some competent Court, rendered upon a suggestion or concealment, or wrongful detaining or defective title in such case, an action for the recovery of the premises so conveyed may be brought, either by the people of this state or by any subsequent patentee or grantee of the same premises, his heirs or assigns, within twenty years after such judgment or decree was rendered; but not after that period."

"Sec. 5. No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seised or possessed of the premises in question, within twenty years before the commencement of such action."

"Sec. 6. No avowry or cognizance of title to real estate, or to any rents or services, shall be valid, unless it appear that the person making the avowry, or the person in whose right the cognizance is made, or the ancestor, predecessor or grantor of such person, was seised or possessed of the premises in question, within twenty years before the committing of the act, in defence of which such avowry or cognizance is made."

"Sec. 7. No entry upon real estate shall be deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry and within twenty years from the time when the right to make such entry descended or accrued."

"Sec. 8. In every action for the recovery of real estate, or the possession thereof, the person establishing a legal title to the premises, shall be presumed to have been possessed, thereof, within the time required by law; and the occupation of such premises by any other person, shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title, for twenty years before the commencement of such action."

"Sec. 9. Whenever it shall appear that the occupant or those under whom he claims, entered into the possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of some competent Court; and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises, under such claim for twenty years, the premises so included shall be deemed to have been held adversely; except that where the premises so included, consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract."

"Sec. 10. For the purpose of constituting an adverse possession, by any person claiming a title founded upon some written instrument, or some judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

"I. Where it has been usually cultivated or improved:

"II. Where it has been protected by a substantial enclosure:

"III. Where, although not enclosed, it has been used for the supply of fuel, or of fencing timber, for the purposes of husbandry or the ordinary use of the occupant:

"IV. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not enclosed, according to the usual custom of the adjoining country, shall be deemed to have been occupied for the same length of time, as the part improved or cultivated."

such instrument shall have been in *such possession, then such right shall be deemed to have first accrued at the time at which the claimant

"Sec. 11. Where it shall appear that there has been an actual continued occupation of any premises, under a claim of title, exclusive of any other right, but not founded upon any written instrument, or any judgment or decree, the premises so actually occupied, and no other, shall be deemed to be held adversely.

"Sec. 12. For the purpose of constituting an adverse possession, by a person claiming title not founded upon some written instrument, or some judgment or decree, land shall be deemed to have been possessed and occupied, in the following cases only:

"I. Where it has been protected by a substantial inclosure.

"II. Where it has been usually cultivated or improved.

"Sec. 13. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent; notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumption shall not be made after the periods herein limited.

"Sec. 14. All writs of *scire facias* upon fines heretofore levied of any manors, lands, tenements, or hereditaments, shall be sued within twenty years next after the title and cause of action first descended or fallen; and not after that period.

"Sec. 15. The right of any person to the possession of any real estate, shall not be impaired or affected, by a descent being cast, in consequence of the death of any person in possession of such estate.

"Sec. 16. If any person entitled to commence any action in this article specified, or to make any entry, avowry, or cognizance, be, at the time such title shall first descend or accrue, either,

"I. Within the age of twenty-one years; or,

"II. Insane; or,

"III. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any term less than for life; or,

"IV. A married woman:

"The time during which disability shall continue, shall not be deemed any portion of the time in this article limited for the commencement of such suit, or the making such entry, avowry, or cognizance, but such person may bring such action, or make such entry, avowry, or cognizance, after the said time so limited, and within ten years after such disability is removed, but not after that period.

"Sec. 17. If the person entitled to commence such action, or to make such entry, avowry or cognizance, shall die during the continuance of any disability specified in the preceding section, and no determination or judgment be had of the title, right or action to him accrued, his heirs may commence such action, or make such entry, avowry or cognizance, after the time in this article limited for that purpose, and within ten years after his death; but not after that period."

"Sec. 32. When any person shall be disabled to prosecute in the courts of this state, by reason of his being an alien, subject, or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed any part of the respective periods limited in the first and second articles of this title, for the making of any entry, or the commencement of any action."

became entitled to such possession by virtue of such instruments; and where the estate claimed shall have been a future estate, and no person

"Sec. 45. The provisions of the preceding articles of this title, shall not apply to any actions commenced, nor to any cases where the right of action shall have accrued, or the right of entry shall exist, before the time when this chapter takes effect as a law; but the same shall remain subject to the laws now in force."

PART II., CHAP. 1., TITLE 3.

"Sec. 18. A widow shall demand her dower within twenty years after the death of her husband; but if, at the time of such death, she be under the age of twenty-one years, or insane, or imprisoned on a criminal charge or conviction, the time during which such disability continues, shall not form any part of the said term of twenty years." Vol. 1, p. 742.

The "*Act for the limitation of criminal prosecutions and actions at law*," 24th Sess. chap. 173; 1 R. L. 184, 185, 186, was the "law in force," when the Revised Statutes went into operation: it contains the following sections.

"III *And be it further enacted*, That all writs of *scire facias* upon fines of any manors, lands, tenements, or hereditaments hereafter to be brought, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen and not after; and no person shall at any time hereafter make any entry into any manors, lands, tenements or hereditaments but within twenty years next after his right or title descended or accrued to the same, and in default thereof such person so not entering, and his heirs, shall thereafter be barred from making such entry; *and further*, That no claim or entry of or upon any manors, lands, tenements or hereditaments shall be a sufficient entry or claim within the meaning of this act, unless an action shall be commenced thereupon within one year next after the making of such entry or claim, and prosecuted with effect: *Provided*, that if any person entitled to any such writ of *scire facias* or to make such entry, be, at the time such right or title first descended or accrued, within the age of twenty-one years, *feme covert*, insane or imprisoned, such person and his heirs, shall or may, after the said twenty years be expired, bring such action or make such entry as he or they might have done before the expiration of the said twenty years, so as such person, within ten years after such disability removed, or the heir or heirs of such person, within ten years after his death, sue forth such writ or make such entry, and at no time after ten years as aforesaid.

"IV. *And be it further enacted*, That any disseisor dying seised of any lands, tenements or hereditaments, having no right or title therein, shall not be taken or deemed any such descent in the law as to toll or take away the entry of any person or his heirs, who, at the time of such descent, shall have lawful right of entry therein, unless such disseisor shall have had the peaceable possession of the lands, tenements or hereditaments whereof he shall die so seised for the space of five years next after the disseisin by him committed, without entry or continual claim by or of the person or persons having lawful title thereto."

NORTH CAROLINA.

(*Act of* 1715.)

Entry or claim into lands, tenements and hereditaments, by persons who shall have right or title thereto, limited to seven years.

Proviso; Saving the rights of such persons as, at the time the right or title first descended or accrued to them, were within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond seas, "so as such persons shall, within three years next after full age, discoverture, coming of sound mind, enlargement out of prison, or persons beyond seas,

shall have obtained the possession in respect thereof, then such right shall be deemed to have first accrued at the time at which the same be-

within eight years after the title or claim becomes due, take benefit and sue for the same, and at no time after the times of limitations herein specified; but that all possessions held without suing such claim as aforesaid, shall be a perpetual bar against all and all manner of persons whatsoever, that the expectations of heirs may not, in a short time, leave much land unpossessed, and title so complexed, that no man will know of whom to take or buy land."

Where persons in possession of lands, &c., or those under whom they claim, have been in possession twenty-one years, under title derived from sales made either by creditors, execution for administrators of any person deceased, or by husbands and their wives, or by indorsement of patents or other colorable title, such possessions are "ratified, confirmed and declared to be a good and legal bar against the entry of any person or persons, under the right or claim of the state, to all intents and purposes whatsoever: any former act, law or usage to the contrary notwithstanding: *Provided, nevertheless,* that the possession so set up shall have been ascertained and identified under known and visible lines or boundaries." Act of 1791, chap. 15.

OHIO.

("Act for the limitation of actions." *Passed 4th January,* 1804.)

"No person or persons shall hereafter sue, have or maintain any writ of ejectment, or other action for the recovery of any possession title or claim of, to or for any lands, tenements or other hereditaments, but within twenty years next after the right of such actions or suits shall have accrued." Ch. 3, sect. 2.

"Sect. 3. *Provided always, and be it further enacted,* That if any person or persons [*who*] is or shall be entitled to have, sue or bring any such action or actions as aforesaid, shall be within the age of twenty-one years, insane, *feme covert,* imprisoned or beyond sea, at the time when any such action or actions may, or shall have accrued, then every such person or persons shall have a right to have, sue or bring any of the action or actions aforesaid within the times hereby before limited in this act, after such disability shall have been removed."

PENNSYLVANIA.

(Act of 26th March, 1785, Chap. 113, Sect. 2. 3 Rev. Laws, p. 40.)

Entry into lands, &c., writs of right or any other real or possessory writ or action for lands, &c., limited to twenty-one years.

Proviso; Saving the rights of persons "within the age of twenty-one years, *feme covert, non compos mentis,* imprisoned, or beyond the seas, or from and without the United States of America," so as such persons or the heirs of such persons, shall, within ten years next after disability removed, "take benefit of or sue for the same." And in case of the benefit, of such persons under any of the disabilities aforesaid, their heirs, "shall have the same benefit, that such person might have had by living until such disabilities had ceased or were removed;" and if any abatement happen in any proceedings upon such right or title, they may be renewed and continued, "within three years from the time of such abatement, but not afterwards." Ibid. sec. 4

By the Act of 11th March, 1800, chap. 2118, the above act is "declared to have no force or effect within what is called the seventeen townships, in the county of Luzerne, nor in any case where title is, or has at any time, been claimed under what is called the Susque-

came an estate in possession; and where the claimant has become entitled by reason of any forfeiture or breach of condition, then such right

hanna company, or in any other way under the State of Connecticut, for any lands or possessions within this Commonwealth."

RHODE ISLAND.

The statutes of 32 Henry, VIII., ch. 2, and of 21 James I., ch. 16, are in force in the state of Rhode Island. Vide *Inman* v. *Barnes*, 1 Gallison's Rep. 316, 317.

The act entitled "an act for quieting possessions and avoiding suits at law," declares: "That where any person or persons, or others, from whom he or they derive their titles, either by themselves, tenants, or lessees, shall have been, for the space of twenty years, in the uninterrupted, quiet, peaceable, and actual seisin and possession of any lands, tenements, or hereditaments within this state, for and during the same time, claiming the same as his, her, or their proper, sole and rightful estate in fee simple, such actual seisin and possession shall be allowed to give and make a good and rightful title to such person or persons, their heirs or assigns for ever. And this act being pleaded in bar, to any action that shall hereafter be brought for such lands, tenements and hereditaments, and such actual seisin and possession being duly proved, shall be allowed to be good, valid and effectual in the law for barring the same." To this act there is the following proviso:

"*Provided further*, That nothing above contained shall extend or be construed, or deemed to extend, to bar any person or persons, having any estate in reversion or remainder expectant or depending, in any lands, tenements, or hereditaments, after the end or determination of the estate for years, life, or lives, such person or persons pursuing his or their title, by due course of law, within ten years after his or their right of action shall accrue, anything in this act, to the contrary notwithstanding." Ibid.

SOUTH CAROLINA.

(*Public Laws, p.* 101. *Act of December* 12*th*, 1712.)

"If any person or persons, to whom any right or title to lands, tenements or hereditaments, within this province, shall hereafter descend or come, do not prosecute the same within five years after such right or title accrued, that then he or they, and all claiming under him and them, shall be forever barred to recover the same, excepting any person or persons beyond the seas, or out the limits of this province, *feme covert*, or imprisoned, who shall be allowed the space of seven years to prosecute their right or title, or claim to any lands, tenements, or hereditaments, in this province, after such right or title accrued to them, or any of them, and at no time after the said seven years; and also excepted, any person or persons that are under the age of twenty-one years, who shall be allowed to prosecute their claims at any time within two years after they come to age, and, if beyond the seas, three years." Ib. sec. 2.

"Persons under twenty-one years shall be allowed five years, after attaining the said age, to prosecute their right or title to lands, and four years after attaining such age to prosecute any personal action to which they are or may be entitled; anything in the said act, passed 12th of December, to the contrary hereof, in anywise, notwithstanding." Act of 29th February, 1788, sec 2. Public Laws, p. 455.

Claim to lands, to be effectual, must be made by "action of law, duly entered in the Court of Common Pleas, within this province, according to the former practice and rules of the said Court." Act of December 12th, 1712, sec. 3.

shall be deemed to have first accrued when such forfeiture was incurred, or such condition broken.

Not only the persons which have not made their claim to any lands, &c., within the time limited by this act, shall be barred, but also all manner of persons whatsoever, that shall at any time claim under such person or persons who have lost their claim, shall be, in like manner, barred by this act. Ib., sec. 5.

And whereas, by this act, a person being a *feme covert*, is limited as to the time of laying claim to lands or tenements, and to commencing actions or suits of law, and not excepted generally until discoverture, and that such person may be no way prejudiced by the same, *Be it further enacted*, That, in case any *feme covert* have any right or claim to any lands or tenements within this province, or any other action or suit whatsoever, such *feme covert* shall have power to constitute an attorney, under her hand and seal, to prosecute such her claim, action, or suit, either in her own name or the name of her husband and self, as if her husband had joined with her in such power of attorney, and such person so constituted shall have power to prosecute such suit or claim to effect, and her husband shall not have power to abate discontinuance or release her claim of action, without her voluntary consent, given in open court, and recorded in the proceedings; neither shall such suit or action be any way abated upon the account of such woman being under coverture, but the proceedings shall be in all things as good and effectual in law, as if such woman was sole, or her husband joined with her in such suit: any law, statute, act, usuage, or custom in this province, to the contrary not withstanding."

TENNESSEE.

(*Act of 16th November*, 1819. *Ch.* 28.)

Seven years' possession of lands, &c., which have been granted by this state, or the state of North Carolina, where the same have been held or claimed by virtue of a deed or deeds of conveyance, devise, grant, or other assurance purporting to convey an estate in fee simple, and no claim by suit in law or equity effectually prosecuted against such possession, within that time, entitles the possessor to keep and hold in possession such quantity of land as shall be specified and described in his, her, or their deed of conveyance, devise, grant, or other assurance, as aforesaid, in preference to, and against all, and all manner of person or persons whatsoever; and shall have a good and indefeasable title in fee simple to such lands, tenements, or hereditaments: any law, usage, or custom to the contrary notwithstanding." And all persons, having a legal or equitable title which they neglect for seven years to prosecute effectually against such possessor, shall be forever barred. Sec. 1.

Provided: Saving the rights of persons who shall be, at the time the said right or title first descended, accrued, come, or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the limits of the United States, and the territories thereof, so as they bring their action within three years next after such disability removed. "*Provided, also*, That, in the construction of this saving, no cumulative disability shall prevent the bar aforesaid; but shall only apply to that or those disabilities which existed when the right to sue first accrued and no other; *and provided, also*, That such suit, so commenced to save the bar, shall be a suit prosecuted with effect and no other."

All suits or actions, either in law or equity, for any lands, &c., limited to seven years. Sec. 2.

Provisos, the same as to the first section.

As to what shall be deemed possession, within the meaning of the above clauses, it is enacted, by sections 10 & 11, that no person shall

VERMONT.

(*Act of 6th November*, 1797, *Ch.* 110. 2 *Digested Laws, p.* 405.)

Writ of right, or other real action; action of ejectment, or other possessory action, of whatever name or nature, limited to fifteen years. Sec. 6.

Entry into lands, &c., limited to fifteen years. Ib.

"This act shall not extend to bar any infant, *feme covert*, person imprisoned, or beyond seas, without any of the United States, or *non compos mentis*, from bringing either of the actions before mentioned, within the term before set and limited for bringing such action calculating from the time such impediment shall be removed. And, if any person, against whom there is, or hereafter may be, any cause or suit, for any or every the species of personal actions before enumerated, who, at the time the same accrued, was without the state, and shall not have property therein which could, by the common and ordinary process of law, be attached; that then, and in every such case, the person who was entitled to bring such action or suit, shall have liberty to commence the same, within the respected periods before limited, after such absent person's coming or return into this state." Sec. 10.

"Nothing contained in any statute of limitation, heretofore passed, shall be construed to extend to any lands, granted, given, sequestered, or appropriated to any public, pious, or charitable use; or to any lands belonging to this state. And any proper action of ejectment, or other possessory action, may be commenced, prosecuted, or defended, for the recovery of any such land or lands: anything in any act or statute of limitations, heretofore passed to the contrary, notwithstanding." "Act relating to public lands." Passed 11th November, 1902. 2 Digested Laws, 412, *et vide* Act of 26th October, 1801. 2 Ibid. 410.

These two last-mentioned acts, however, were, by the Act of 6th November, 1819, ch. 15, *repealed*, "so far as they relate to the rights of land in this state, granted to the Society for the Propagation of the Gospel, in foreign parts."

VIRGINIA.

Writs of right upon the seisin or possession of the demandant's ancestor or predecessor, limited to fifty years.

Other possessory actions, upon the like seisin or possession, limited to forty years.

Real actions, upon demandant's own seisin or possession, limited to thirty years.

Writs of *formedon*, in descender, remainder, or reverter, of any lands, tenements, or hereditaments, limited to twenty years next after the title or cause of action accrued. And entry into lands, &c., limited to the same time.

Proviso: Saving the rights of any persons, under the age of one-and-twenty years, *feme covert, non compos mentis*, imprisoned, or not within this commonwealth at the time such right or title accrued, who, and his heirs, may, notwithstanding the said twenty years are expired, bring and maintain his action, or make his entry, within ten years next after such disabilities removed, or the death of the person so disabled, and not afterwards.

The maxim *nullum tempus occurrit regi* applies to the state; and no title to lands can be acquired against the state by the statute of limitations. The statute of limitations cannot bar an escheat, or give a right to escheated property. *Harlock et al.* v. *Jackson*, 1 Constit. Rep. 135.

be deemed to have been so in possession merely by reason of having made an entry thereon, or continued claim thereof; and by section 35, the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee, or any person claiming under him, (but subject to the lease,) be deemed to be the receipt of profit. And by

The statute of limitations does not run against the commonwealth. *Commonwealth* v. *M'Gowan*, 4 Bibb's Rep. 62; *Et vide Kemp* v. *Commonwealth*, 1 Hen. & Munf. Rep. 85; *Nimmo's exrs.* v. *Commonwealth*, 4 Ib. 57.

The commonwealth cannot be disseised; neither does the statute of limitations run against the commonwealth. *Chiles* v. *Calk*, 4 Bibb's Rep. 554.

"No laches can be imputed to the government, and against it no time runs so as to bar its rights." *Stoughton et al.* v. *Baker et al.*, 4 Mass. Rep. 628. Per Parsons, Ch. J., delivering the opinion of the Court.

"The commonwealth cannot be affected by the act of limitations." *Johnston* v. *Irwin*, 3 Serg. & R. Rep. 292. Per Tilghman, Ch. J., delivering the opinion of the Court.

Possession cannot be pleaded against the public, unless it is immemorial. *Allard et al.*, v. *Lobau*, 3 Martin's Rep. (N. S.) 294.

Statutes of limitations do not run against the United Stated. *United States* v. *Hoar*, 2 Mason's Rep. 312.

A constructive possession of lands, under color of title, for twenty-one years, under known and visible boundaries or lines, will not bar the right of entry under the state. Nor will the actual possession for twenty-one years of different parts of the lands covered by color of title, by purchasers from him to whom the color of title was made, avail him as to the parts of the land not sold or actually possessed. For they are distinct tracts, held by different persons in different rights. *Doe ex dem. Clinton et al.* v. *Herring*, 1 Murph. Rep. 414.

A grant of land by the commonweath will pass its title, notwithstanding an adverse possession, the commonwealth being incapable of being disseised. *Ward.* v. *Bartholomew*, 6 Picker. Rep. 409.

In the case of *Hall* v. *Gitting's Lessee*, (2 Harr. & Johns. Rep. 112, 114,) Chase, Ch. J., (with whom the other judges, Duval and Done, concurred,) said: "The Court are of opinion, that there is no adversary possession on the part of the defendant which can defeat the right derived from the state. Under the act of October, 1780, ch. 49, the state became actually possessed of the land; and that act dispenses with the requisites necessary in the case of the crown to avoid a possession adversary to the right of the crown, to wit, an office found, or an actual entry. By an office found, in England, the crown becomes actually seised and possessed of any escheat land in question. The state then had the right to pass the act of assembly; and, by that act, the state, by its commissioners, was in as full possession of the land as if there had been an office found, or actual entry by the commissioners, and ouster of the defendant, or those under whom he claims."

Previous to the first of January, 1830, by the first section of the act of the Legislature of the State of New York, entitled "An Act for the Limitation of Criminal Prosecutions and of Actions at Law," passed 8th April, 1801, (1 R. L. 184,) all suits by the State, "for, or in respect to, any lands, tenements, or hereditaments, other than liberties or franchises, or the issues or profits thereof," were limited to forty years

But now, by the Rev. Sts., pt. 2, ch. 4, tit. 2, art. 1, sec. 1, the limitation is reduced to twenty years. And sec. 2 contains an exception as "to any liberties or franchises." Vol. 2, pp. 292, 293.

section 14, where any acknowledgment of title shall be given to a party or his agent, in writing, signed by the person in possession, then the possession of such person shall be deemed to be the possession of the party to whom or to whose agent such acknowledgment was given; and the right of such party, or those claiming through him, to recover such land, shall be deemed to have first accrued at and not before the time at which such acknowledgment was given.

Attornment in writing, is, of course, a good admission of title, within the meaning of this clause; and if it be merely an attornment, and do not amount to a new demise, it will not require a stamp.(*a*) So where, in answer to an application for alleged arrears of rent, the tenant, by letter, complained of *having been put to much expense with respect to the land, and said it was reasonable that the lords of the fee should make him recompense accordingly, and that *F.*, (the party applying,) should vindicate his right to the land rather than that the expenses should fall upon the tenants, and concluded his letter by begging "compassion, mercy, and pity, and recompense in a satisfactory manner," this was holden to be an admission of title within the meaning of this section.(*b*) But, where a party in adverse possession of land, being applied to by a person claiming title to it to pay rent, offering a lease of it, wrote thus, "Although if matters were contested, I am of opinion, that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent, on an agreement for a term of twenty-one years;" but the bargain went off, and no rent was paid or lease executed, this letter was holden not to amount to an admission of title within the meaning of this section.(*c*)

Where *A.* was in possession of lands for more than twenty years, and died in possession, and his widow had possession from that time until her death, twenty years after, and *B.* was the eldest son both of *A.* and his wife, it was contended that *B.* could not recover, because, as heir of his father, he had been kept out of possession by his mother above twenty years, and was, therefore, barred by the statute 3 & 4 Wm. 4, c. 27, and he could not claim as heir of his mother, because, the mother's possession not being an adverse one, she could not acquire a

(*a*) *Doe d. Livsey* v. *Edwards*, 5 Ad. & Ell. 95.
(*b*) *Furdson* v. *Clegg*, 10 Mee. & W. 572.
(*c*) *Doe d. Curzon* v. *Edmonds*, 6 Mee. &. W. 295.

descendible estate; *Coleridge*, J., directed the jury to infer that the property belonged to the mother, and survived to him on her husband's death, and then descended to *B.* as his heir, and the plaintiff had a verdict.(*a*)

*Secondly, as to the time within which a remainderman or reversioner must claim.

By section 3, when the estate claimed is a future estate, and no person has obtained possession in respect thereof, then the right is deemed to have first accrued at the time at which such estate became an estate in possession. Where, therefore, a lessor allowed his tenant to remain in possession for more than twenty years without paying rent, he is not thereby deprived of his right; but may bring his action at any time within twenty years after his reversion becomes an "estate or interest in possession," that is to say, after the tenant's term has expired.(*b*) Where the tenant for life has gone abroad, and not been afterwards heard of, the statute begins to run against the remainderman from the time the tenant for life goes abroad, (unless he is able to prove the exact period of his death,) and not from the expiration of seven years.(*c*)

By section 5, it is enacted, that the right to make an entry, or bring an ejectment, shall be deemed to have accrued in respect of any estate or interest in reversion at the time at which the same shall have become an estate or interest in possession, by the determination of any estate, in respect of which the land shall have been held, or the profits received, notwithstanding, the claimant should, previously to the creation of the determined estate, have been in possession or receipt of the profits.

But, by section 20, when the right of any person entitled to an estate in possession, shall have been barred by the determination of the period applicable by the statute to such case, and such person shall, at any time during such period, have been entitled to any other estate whatsoever in reversion, or †otherwise, to the same land, no entry or action shall be made or brought, by such person, or any person claiming through him in respect of such other estate, unless in the mean time such land shall have been recovered by some person entitled to an es-

(*a*) *Doe d. Bennett* v. *Long*, 9 C. & P. 773.
(*b*) *Doe d. Davey* v. *Oxenham*, 7 M. & W. 131.
(*c*) *Nepean* v. *Doe*, (in error,) 2 M. & W. 894.

tate, limited or having taken effect after or in defeasance of such estate in possession.

Where the rights of a remainderman, &c., arise after an estate tail, if the tenant in tail die seised, the remainderman must enter or bring his action within twenty years after the death. But by section 21, when the rights of a tenant in tail have been barred by reason of the same not having been enforced within the period applicable in such case, the bar, after his decease, will extend to every person claiming any estate which such tenant in tail might lawfully have barred. And by section 22, when a tenant in tail shall die before the expiration of the period, applicable in such case, for making an entry, or bringing an action, no person claiming any estate which such tenant in tail might lawfully have barred, shall make an entry or bring an action, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or brought such action.[1]

Where estates were settled to the use of A. B. for life, with remainder to her issue in tail, and remainders after, and in 1818, by

[1] An act of the Legislature of the State of New York, passed 23d February, 1786; (9th Sess., ch., 12, 1 R. L. 52,) abolished all estates tail, and controverted them into estates "in fee simple absolute."

The Revised Statutes, (pt. 2, ch. 1, tit. 2, secs. 3, 4, vol. 1, p. 722,) contain the like provisions.

Sec. 3. "All estates tail are abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed previous to the twelfth day of July, one thousand seven hundred and eighty-two, shall hereafter be adjudged a fee simple; and, if no valid remainder be limited thereon, shall be a fee simple absolute.

Sec. 4. "Where a remainder in fee shall be limited upon any estate, which would be adjudged a fee tail, according to the law of this state, as it existed previous to the time mentioned in the last section, such remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession on the death of the first taker, without issue living, at the time of such death."

In Virginia, Kentucky, Tennessee, North Carolina, Indiana, Georgia, Mississippi, Alabama, and Michigan, entailments are expressly abolished, or estates tail declared to be estates in fee simple. In South Carolina and Louisiana, they never existed; while, in other states, they exist in a qualified degree. In Illinois, Missouri, and Arkansas, the donee in tail takes a life estate, and his issue a fee simple. In New Jersey, Ohio, and Connecticut, estates tail become estates in fee simple in the heirs of the original owner. In Vermont, the constitution provides that the legislature shall regulate entails in such a manner as to prevent perpetuities. In Pennsylvania, Maryland, Massachusetts, Maine and Delaware, estates tail may be conveyed, and in Rhode Island and Virginia, conveyed or devised so as to pass a fee simple. See Dart's Vendors & Purchasers, Waterman's edition; Introduction.

proper assurances, to which A. B., her husband and only child, R. G., were parties, the estates were limited to the husband for life, remainder to the wife for life, remainder to R. G. for life, remainder to his issue in tail, remainder to J. F., his sister, for life, with other remainders over; and the husband died in 1819, the wife in 1822, and R. G. in 1828, it was held that inasmuch as the estate of J. F. was carved out by the estate tail of R. G., she had the same period for bringing the ejectment as he *would have had if he had continued to live, that is to say, twenty years from 1822, when his remainder came into possession.(*a*)

With respect to the rights of a reversioner against a tenant at will, or from year to year, it is enacted by section 7, that when any person shall be in possession as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or bring an action, shall be deemed to have first accrued, either at determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. It is provided by the statute that no mortgagee or *cestui que trust* shall be deemed to be a tenant at will within the meaning of this clause.

The trusts comprised within this proviso are only express and declared trusts, and a purchaser let into possession under an agreement to purchase is not a *cestui que trust* within its meaning but a tenant at will, and in case the agreement should not be completed, the vendor must bring his action within twenty years, or he will be barred.(*b*)[1]

(*a*) *Doe d. Curzon* v. *Edmonds*, 6 Mee. & W. 295.
(*b*) *Doe d. Counsell* v. *Caperton*, 9 Car. & P. 112.

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[1] The possession of the *cestui que trust*, is not averse to the title of the trustee. *Smith ex dem. Dennison et al.* v. *King et al.*, 16 East's Rep. 283; *Et vide Sir William Smith* v. *Wheeler*, 1 Ventris' Rep. 129.

And it is a maxim that no conveyance by *cestui que trust*, can work a forfeiture of the legal estate of the trustee, it has been held that a fine or other alienation by *cestui que trust* for life, does not work a forfeiture of his life estate. Saunders on Uses, 201.

In the case of *Lethieullier* v. *Tracy*, (3 Atk. Rep. 729, 730,) Hardwicke, Lord Chancellor, said: "I will suppose, for argument's sake, that Mrs. Tracy had levied *a fine sur concessit* of her estate for life; yet, as it is a trust estate, and there are limitations to trustees to preserve contingent remainders, I am of opinion that it does not work a forfeiture of her estate for life, because it cannot at all hurt or affect the subsequent remainders, as there are trustees under the will to preserve them, and therefore such a fine would in equity operate at most as a grant only of such interest as she had a power to grant." "A court of equity

But where, in 1816, a person was then let into possession under an agreement to purchase, which was never completed, and continued in

will never construe such a fine to work a wrong, but it operates only on the trust to preserve the contingent remainders and not on the legal estate; for Lord Talbot in the case of *Hoskins and Hoskins*, and myself in a cause that came before me afterwards, were of opinion, that a person so entrusted levying a fine creates no wrong, but operates so as to grant all the conusor had a power to grant."

Cestui que trust is "tenant at will" to the trustee, and the possession of the *cestui que trust* is, "the very possession, in consideration of law of the trustees." *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. Sen. Rep. 481. *Et vide*, to the same purport, *Lethieullier* v. *Tracy*, 3 Atk. Rep. 729, 730.

Cestui que trust, is tenant at will to his trustee, and his possession is the possession of the trustee. *Dighton* v. *Grenvil*, (in error,) 2 Ventris' Rep. 329.

The statute of limitations "does not reach to matters of direct trust, as between trustee and *cestui que trust*." *Coster et al.* v. *Murray*, 5 Johns. Ch. Rep. 531; *Turner et al., Ex'rs.*, v. *Debell, Ex'r.*, 2 Marsh. Rep. (Ky.) 384.

Nor to parties standing in the relation of principal and agent or factor. 5 Johns. Ch. Rep. 531.

"This is a trust estate, against which the limitation does not run or operate." *Gist et al. Representatives, &c.*, v. *Heirs, &c., of Catlell*, 2 Equity Rep. (Desaussure) 55; *Et vide West* v. *Randall et al.*, 3 Mason's Rep. 203.

"It is equally said that fraud as well as trust is not within the statute." *Kane* v. *Bloodgood*, 7 Johns. Ch. Rep. 122; (Per Kent, Ch.;) *Et vide Ex'rs of Hunter et al.* v. *Spotswood*, 1 Wash. Rep. 145.

As a rule, the statute of limitations does not operate in cases of fraud and of trusts; but as soon as the fraud is discovered it commences to run. *Wamburzee et al.* v. *Kennedy et al.*, 4 Eq. Rep. (Dess.) 479; *Sweat* v. *Arrington, Adm'r, &c.*, 2 Hayw. Rep. 129.

It is a settled rule, that the statute of limitations cannot, either in a court of law, or equity, protect a trustee against the demands of his *cestui que trust*. *Thomas* v. *White et al.*, 3 Littel's Rep. 177, 181.

Trustees cannot urge the lapse of time against the *cestui que trust*. *Trustees of Lexington* v. *Heirs of Lindsay*, 2 Marsh. Rep. (Ky.) 445.

A trustee cannot take advantage of the act of limitations, against the claim of the *cestui que trust*, or of persons claiming under him. *Redwood* v. *Riddick, et ux.*, 4 Munf. Rep. 222.

"So long as the trust subsisted, so long it was impossible that the *cestui que trust* could be barred. The *cestui que trust* could only be barred by barring and excluding the estate of the trustee." *Cholmondeley* v. *Clinton et al.*, 2 Meriv. Rep. 360.

Land was devised to A. in trust to apply the rents and profits to the support of B. during his life, and in an action by the *cestui que trust* against the trustee to recover the rents and profits, it was *held* that the general statute limitation does not apply to trusts. *Hemenway* v. *Gates, Administrator, &c.*, 5 Picker. 321.

"It is true, the statute of limitations cannot be pleaded against a breach of trust, nor can a person who has taken a conveyance from the trustee shelter himself under a plea of that statute." *Botelar* v. *Allington*, 3 Atk. Rep. 459; (Per Hardwicke, Lord Chancellor.)

"It is certainly true that length of time is no bar to a trust clearly established: and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time, during which the fraud has been successfully concealed and practised, is rather an ag-

possession until his death in 1822, without paying rent; and then his widow, to whom he had devised all his real estate, entered and was

gravation of the offence, and calls more loudly upon a court of equity to grant ample and decisive relief. But length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption in favor of innocence, and against imputation of fraud. *Prevost* v. *Gratz et al.*, 6 Wheat. Rep. 497, 498. Per Story, J., delivering the opinion of the court.

"A trustee cannot avail himself of the act of limitations; and it requires plain, strong and unequivocal proof of his renunciation of the trust to divest himself of it for the purpose of benefitting himself by the act of limitations, to destroy the rights and interests of the *cestui que trust*. Length of possession is the strong fact on which the presumption was prayed. The possession is accounted for by the proof, which shows how it was acquired by Darnall, how continued, and how transmitted to his representatives, not inconsistent with the moral duties, his probity or honor, nor in derogation of the rights and interests of the creditors and legal representatives of J. Fishwick, but for the preservation of the property for the benefit of her creditors and legal representatives. And by this proof is the presumption most conclusively repelled." Per Chase, Ch. J., delivering the opinion of the court of appeals; *Fishwick's Admr.* v. *Sewell*, 4 Har. & Johns. Rep. 430. [This was not a case of *direct* trust, but of trust *by implication or construction of law.*]

A purchaser for a valuable consideration, if affected with notice, becomes a trustee for the true owner, and will not be protected by the statute of limitations. *Wamburzee et al.* v. *Kennedy et al.*, 4 Eq. Rep. (Dess.) 474. Vide et *Thayer, Assignee, &c.*, v. *Cramer et al.*, 1 M'Cord's Ch. Rep. 395, 398.

If a *bona fide* purchaser, *without notice*, but who is a trustee by *implication*, is to be affected by an equity, that equity must be pursued within a reasonable time. *Shaver et al.*, v. *Radley et al.*, 4 Johns. Ch. Rep. 310; Et vide *Thompson et ux. et al.* v. *Blair et al.*, 3 Murph. Rep. 583.

A legacy or trust is not within the statute of limitation; but after a length of time, payment will be presumed; yet such presumption may be rebutted by other circumstances; and what operation they should have is for the consideration of the jury. *Durdon, Exr. &c.*, v. *Gaskell*, 2 Yeates' Rep. 268, 271.

In the case of *Van Rhyn* v. *Vincent's Executors*, (1 M'Cord's Ch. Rep. 310, 313,) the court, per Nott, J., said: "For although it is a rule in the court of equity that lapse of time will be no bar between a trustee and a *cestui que trust*, yet that doctrine applies only to technical, equitable trusts, and not to those constructive trusts of which a court of law as well as a court of equity have jurisdiction."

The rule that trust and fraud are not within the statute of limitations, is subject to this modification, that if the trust be constituted by the act of the parties, the possession of the trustee, is the possession of the *cestui que trust*, and no length of such possession will bar; but if a trust be constituted by the fraud of one of the parties, or arises from a decree of a court of equity, or the like, the possession of the trustee becomes adverse, and the statute of limitations will run from the time the fraud is discovered. *Thompson et ux et al.* v. *Blair et al.*, 3 Murph. Rep. 583; and to the like purport, vide *Van Rhyn* v. *Vincent's Exrs.*, 1 M'Cord's Ch. Rep. 314.

An executor entering on lands of the estate of his testator and occupying them, is to be considered as holding them in trust for the heirs or devisees, unless he proves that he held adversely with notice to the heirs or devisees; in which case, the proof lies on him to estab-

possessed; and rent being demanded of her in 1827, she promised to pay it but never did: in ejectment brought in 1842, by the heir of the vendor, the Court held that it was rightly left to the jury to say, whether a tenancy at will had not been created between the vendor *and the widow, the action being otherwise barred by this section.(*a*)

The rights conferred on tenants at will by this statute, do not extend to such tenants at will as shall have quitted possession before the statute was passed, so as to enable them to recover the land, on the ground that they had acquired a fee by the non-payment of rent for twenty years before they quitted possession.(*b*)

Where a tenancy at will has been created between the lessor and the defendant, or those under whom he claims, and such tenancy has been

(*a*) *Doe d. Stanway* v. *Rock*, 1 Car. & M. 549; 4 M. & G. 30.
(*b*) *Doe d. Thompson* v. *Thompson*, 6 Ad. & Ell. 721.

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lish the claim at law, on an issue directed. *Ramsay et ux* v. *Deas' Exr. &c.*, 2 Eq. Rep. (Dess.) 233.

The statute of limitations is not allowed to run in favor of a man who was employed to act as agent, but purchased for himself. He is considered as a trustee; and his employer shall be entitled to the benefit of the purchase. *Hutchinson* v. *Hutchinson*, 4 Eq. Rep. (Dess.) 77.

In the case of *Lessee of Bell* v. *Levers*, (3 Yeates' Rep. 26,) Shippen, Ch. J., in his charge to the jury, said: "As to the survey said to have been made by John Seeley for his own use in 1772, there is abundant ground to believe that it was not then made, and that it was improperly foisted into the office. He *knew* that he had made the survey for Levers, and at his expense, and as he could gain no title by his villainy and breach of trust, so neither could he communicate any to Towers, by his conveyance of the 19th May, 1775."

In the case of *Starr* v. *Starr et al.*, (2 Ohio Rep. [Hamm.] 321, 328,) the court said; "That this trust was not formally declared or expressed between the parties, is no reason why it cannot exist. The law is not to be evaded by contrivances of this nature. A trust tacitly created is more difficult to reach than one that is expressed; but where it is ascertained, the same consequence is attached to it."

The general rule is, that after a sale of land, and before a conveyance of a legal title, the vendor is the trustee of the vendee, and the act of limitations will have no operation. But where the vendor disavows the trust, and after having delivered possession to the vendee, makes a lease to a third person in opposition to the title of the vendee, and the lessee enters and holds possession, the jury may presume a disseisin, and if the vendee suffers twenty-one years to elapse without prosecuting his claim, it will be barred by the act of limitations. *Pipher et al* v. *Lodge*, 4 Serg. & R. Rep. 310.

But, to prevent length of time from barring a claim, on the ground that the possession of the defendant was *fiduciary*, such possession must have been *fiduciary as to the plaintiff or those under whom he claims;* its being fiduciary as to any other person, is not sufficient. *Spotswood* v. *Dandridge et al.*, 4 Hen. & Munf. 139.

determined, and a new tenancy at will created, the statute will run from the time of the creation of such second tenancy, and the determination of the original tenancy at will is a question for the jury.[1]

[1] "The possession of one tenant in common recognizing the title of his co-tenants, is, in legal consideration, the possession of all." *Barrett et ux.* v. *French*, 1 Con. Rep. 364. (Per Swift, Ch. J., delivering the opinion of the court.) *Et vide Bryan* v. *Atwater*, 5 Day's Rep. 188.

"The possession of tenants in common is one and undivided, neither can one alone support an action of trespass. The possession of one, therefore, is the possession of all, and if one enters generally, without saying for whom, it will be implied, that he enters according to law; that is to say, for himself and the others. I find a case, in which it was expressly decided, that the entry of one tenant in common shall enure to the benefit of another, as regards strangers. (*Small* v. *Dale*, Hob. 120; Moore, 868; 14 Vin. 512, P. a. pl. 1)" *Corothers et al.* v. *The Lessee of Dunning et al.*, 3 Serg. & R.'s Rep. 381. (Per Tilghman, Ch. J.) Same case, pages 385, 386, the like opinion by Gibson, J.

But in the case of *Doolittle et ux.* v. *Blakesley*, (4 Day's Rep. 273,) Brainard, J., who delivered the opinion of the court, said, "In case of tenants in common, as before observed, the possession of one is the possession of the other, as it respects themselves. But as it respects strangers, it is totally different. One tenant in common, as it respects his fellow tenant, is always safe in the possession of his fellow tenant, unless ousted. But when disseised, either by a fellow tenant or a stranger, he has his remedy in his own right upon his own individual title; and if he will not exercise this right within the fifteen years, he must suffer the consequences of an adverse possession; and lose his estate."

It must be conceded that an action for partition, speaking of it in general terms, can be prescribed against only by a lapse of thirty years, and not even by this or any other much greater length of time when the partners or co-heirs possess in common an inheritance or property. *Gravier et al.* v. *Livingston et al.*, 6 Mart. Rep. 410. Per Mathews, J., delivering the opinion of the court.

Purchasers under the same title, without partition, cannot prescribe against each other, by the lapse of ten years. *Broussard* v. *Duhamel*, 3 Mart. Rep. (N. S.) 11.

The possession of a tenant at will, is the possession of the person under whom he claims. *Jackson ex dem. Young et al.* v. *Ellis et al.*, 13 Johns. Rep. 120, 121.

After the expiration of his term, a tenant for years becomes, by continuing in possession, a tenant at sufferance. *Wilde* v. *Cantillon*, 1 Johns. Cas. 124; *Jackson ex dem. June* v. *Raymond*, ibid. 86, *in notis.*

And his possession is not a disseisin of his landlord, except by election. *Jackson ex dem. June* v. *Raymond*, ibid. 85.

If a tenant at will execute a lease and give possession of the premises to his lessee, the owner of the land is not thereby disseised. *Jackson ex dem. Van Alen* v. *Rogers*, 1 Johns. Cas. 33.

Nor is his conveyance in fee a disseisin, unless at the election of his landlord. *Jackson ex dem. Van Schaick et al.* v. *Davis*, 5 Cow. Rep. 134.

And even the holding over of a tenant for life, after the determination of his estate, though he claim the fee, is not a disseisin of the rightful owner. *Varick et al.* v. *Jackson ex dem. Eden et al*, (in error,) 2 Wen. Rep. 166; *Lion ex dem. Eden* v. *Burtiss et al.*, 20 Johns. Rep. 491.

It is "not a disseisin, but a mere deforcement, which is defined to be the holding of any

An entry on the land by the landlord without the tenant's consent, and cutting and carrying away stones therefrom, has been held on error to

lands or tenements to which another person hath right." *Lion ex dem. Eden* v. *Burtiss et al.*, 20 Johns. Rep. 491. Per Spencer, Ch. J., delivering the opinion of the court.

"That one tenant in common may oust his co-tenant and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession." *M'Clung* v. *Ross*, 5 Wheat. Rep. 124. Per Marshall, Ch. J., delivering the opinion of the court. *Et vide Cuyler et al.* v. *Bradt et al.*, 2 Caines' Cas. Er. 325.

The fact, that one tenant in common is in possession of the estate, claiming to hold it by a deed covering the whole of it, is sufficient evidence of ouster to support ejectment by a co-tenant. *Clark* v. *Vaughan*, 3 Conn. Rep. 191; *et vide Leonard et al.* v. *Leonard*, 10 Mass. Rep. 283.

"The law is, that nothing but an actual ouster, by one tenant in common, shall give him the exclusive possession. *Fairclaim ex dem. Empson* v. *Shackleton*, 5 Burr 2604." *Carothers et al.* v. *The Lessee of Dunning et al*, 3 Serg. & R. Rep. 385. Per Gibson, J.

One tenant in common cannot maintain ejectment against his co-tenant without actual ouster. *Barnitz's Lessee* v. *Casey*, 7 Cranch's Rep. 557; *Et vide Higbee et al.* v. *Rice*, 5. Mass. Rep. 351; *Doe ex dem. Gigner* v. *Roe*, 2 Taunt. Rep. 397.

The statute of limitations will not run in favor of a purchaser for a valuable consideration, who had knowledge of the rights of parties, nor where he held as tenant in common, and during the minority of the other party. *Saxon et ux.* v. *Barksdale et al.*, 4 Eq. Rep. (Desaus.) 522.

A person who has entered by the permission of one tenant in common cannot, a partition having been made, set up an adverse possession in bar of an action of ejectment, by the tenant in common, to whose share the premises had fallen. *Jackson ex dem. Fisher* v. *Creal et al.*, 13 Johns. 116.

"The question, whether the entry of a tenant in common is such as to accrue to the benefit of the others, and whether one has actually ousted another, are questions of fact, involving sometimes the intentions and motives of the party in possession; which it is the province of a jury to determine." *Cummings* v. *Wyman*, 10 Mass. Rep. 468.

In the case of *Jackson ex dem. Bradt et al.* v. *Whitbeck*, (6 Cow. Rep. 633,) Sutherland, J., delivering the opinion of the court, said: "It appears to me, that admitting the premises in question to have descended to the children of Bernardus Bradt, as tenants in common, the evidence in the case warrants the presumption of *an actual ouster* of his co-tenants by Hendrick. Here has been an exclusive possession under claim of title, for forty years, without any assertion of right, or claim to any portion of the profits of the premises on the part of his co-tenants, although they all resided in the same county, within forty miles of the premises." *Et vide Van Dyck* v. *Van Beuren et al.*, 1 Caines' Rep. 84, to the like effect. And *Bryans* v. *Atwater*, 5 Day's Rep. 188; *Brackett* v. *Norcross*, 1 Greenl. Rep. 91.

One tenant in common hindering the entry of the other is an ouster. *Gordon* v. *Pearson*, 1 Marsh. Rep. 323.

If one tenant in common sell the whole tract, and possession be held adversely, for twenty-one years, the sale and possession amount to an ouster of the co-tenant, who is barred by the act of limitations. *Culler et al.* v. *Motzer*, 13 Serg. & R. Rep. 356. (In error.) This was an action of debt on bond, brought in the Court of Common Pleas of Perry county, by Motzer, the defendant in error and plaintiff below, against Culler and others, plaintiffs in error and defendants below, and issue was on the plea of payment. The bond was given

warrant a jury in finding the then existing tenancy at will thereby determined; and a subsequent assessment for the land tax in the parish

for the purchase money of a tract of land, conveyed by Motzer to Culler, with covenants of warranty. The defence was, a defect of title, and an outstanding claim of dower.

The title originated in an improvement made by John Brown, who, in 1775, devised one-half of it to Mary Brown, and the other half to James Brown. Mary Brown died intestate, leaving two children, William Brown and Nancy Brown, (now Maxwell.) William Brown thus became entitled to one-fourth, and Nancy to one-fourth, and in 1799, William Brown and one George Brown, conveyed to Martin Motzer. In 1800, William Brown obtained a patent in his own name for the whole tract. In the deed from George and William to Motzer, it was recited, that on the —— day of ——, 1797, Nancy Brown or Maxwell, conveyed by deed her interest in the premises to them as tenants in common. George and William came into the possession of the land before 1799, and it had since continued in their possession, and the possession of those claiming under them. The widow of George Brown was still living. On these facts, the plaintiff below contended that the right of James, and the claim of George's wife to dower, were barred by the statute of limitations. The Supreme Court held, that the right of James was barred, but that the claim of George's wife to dower was not barred.

"It is true that the mere permanency of all the profits by one tenant in common, is not an ouster of another tenant in common." *Higbee et al.* v. *Rice*, 5 Mass. Rep. 351. (Per Parsons, Ch. J., delivering the opinion of the court.)

"A bare perception of profits will not oust a tenant in common; and for the statute of limitations to operate as a bar, the possession must be *adverse*." *Morris's Lessee* v. *Van Deren*, 1 Dall. Rep. 67. (Per M'Kean, Ch. J.) *Et vide Lloyed* v. *Gordon et ux.*, 2 Harr. & M'Hen. Rep. 260; *M'Clung* v. *Ross*, 5 Wheat. Rep. 124. *Cuyler et al.* v. *Bradt et al.*, 2 Caines' Cas. Err. 335.

If a defendant has acknowledged the title of the plaintiff, he cannot afterwards dispute it. *Jackson ex dem. Low et al.* v. *Reynolds*, 1 Caines' Rep. 444; *et vide Jackson ex dem. Viely & Clark* v. *Cuerden*, 2 John. Cases, 353; *Doe ex dem. Human* v. *Pettett*, 5 Barn. & Ald. Rep. 223; *Lessee of Galloway* v. *Ogle*, 2 Binn. Rep. 472; *Graham et al.* v. *Moore et al.*, 4 Serg. & R. Rep. 467; *Jackson ex dem. Van Schaick et al.* v. *Davis*, 5 Cow. Rep. 129, 130; *Jackson ex dem. Griswold et al.* v. *Bard*, 4 Johns. Rep. 230; *Brandter ex dem. Fitch et al.* v. *Marshall*, 1 Caines' Rep. 394; *Rowletts* v. *Daniel*, 4 Munf. Rep. 473; *Jackson ex dem. Russell et al.* v. *Croy*, 12 Johns. Rep. 430; *Duvall et al.* v. *Bibb*, 3 Call's Rep. 366; *Jackson ex dem. Dox* v. *Jackson*, 5 Cow. Rep. 174; *Higginson* v. *Mien*, 4 Cranch. Rep. 419; *Hall* v. *Doe ex dem. Surtees et al.*, 5 Barn. & Ald. Rep. 687.

In the case of *Jackson ex dem. Swartwout et ux.* v. *Cole*, (4 Cowen's Rep. 587, 598,) Sutherland, J., delivering the opinion of the court, said, (after suggesting the presumption that the trustee had been reimbursed his advances and conveyed to the *cestuis que trust*,) "This presumption derives confirmation from the fact, as testified by Morse, that many portions of the land of David Colden, mentioned in the location and appraisement, had been held for upwards of thirty years under his heirs; and also from the circumstance that the defendant himself, as early as 1798, took a conveyance of the premises in question from one of the daughters of David Colden and the husbands of two others. Indeed, it may be questioned whether this is not such a recognition of the legal title of the heirs as to preclude the defendant from denying that it passed from the trustee to the *cestui que trust*."

"It has been decided, and is settled law of the country, that a tenant shall not resist the recovery of his landlord, by virtue of an adverse title acquired during his lease." *Lessee of*

by the defendant, being an assessor, in which he names himself as occupier, and his landlord as proprietor of the land, is evidence from

Galloway v. *Ogle*, 2 Binney's Rep. 472; Et vide *Graham et al* v. *Moore et al.*, 4 Serg. & R. Rep. 467.

And even where the predecessor of the defendant, had acknowledged the title of the claimant, it was *held* that the defendant was equally precluded from setting up the defence of adverse possession. *Jackson ex dem. Van Schaick et al.* v. *Davis*, 5 Cow. Rep. 129, 130.

And to the same purport, vide *Jackson ex dem. Griswold et al* v. *Bard*, 4 Johns. Rep. 230; *Brandter ex dem. Fitch* v. *Marshall*, 1 Caines Rep. 394; *Rowletts* v. *Daniel*, 4 Munf. Rep. 473.

"The statute does not run in favor of one, against another tenant in common. If, however, there has been no actual *ouster* and *adverse* holding, the statutes of limitations will run from the time of such ouster and adverse possession." *Coleman* v. *Hutchinson*, 3 Bibb's Rep. 212. (Per Logan, J., delivering the opinion of the Court.) *Et vide Brackett* v. *Norcross*, 1 Greenl. Rep. 91. *Russell's Lessee* v. *Barker*, 1 Har. & Johns. Rep. 71. *Doolittle et ux.* v. *Blakesley*, 4 Day's Rep. 273. *Bradstreet* v. *Huntington*, 5 Peter's Rep. 402.

In ejectment by one tenant in common against another, it is a sufficient denial by the defendant of the plaintiff's right, that the defendant claims the whole premises as his own, that he has offered to sell the same and declares that the plaintiff would be compelled in equity to execute a deed given by his brothers and sisters as heirs of their father, in compliance with a contract made with the grantor of the defendant. *Valentine* v. *Northrop*, 12 Wen. 494.

It has been decided that a possession of thirty-six years without any account or demand, or claim set up by the co-tenants, was sufficient to presume an actual ouster; and the same principles upon the same facts might arise in case of a lessee or purchaser by executory contract. *Chambers* v. *Pleak*, 6 Dana's Rep. 432.

Where the tenant of land for a year, held over, and after the expiration of his term paid rent to a stranger, and refused to quit the premises, being called upon by the agent of the lessor for that purpose; this was held to be no *disseisin* of the lessor, not even at his election, nor such as would prevent the operation of a deed from the lessor to a third person. *Porter* v. *Hammond*, 3 Greenl. Rep. 188.

Where A.'s tenant from year to year, takes a lease from B., the act is void, and cannot work an adverse possession against A. *Jackson ex dem. Williams et al.* v. *Miller*, 6 Cow. Rep. 751.

The defendant went into possession of land under Gansevoort, whom he supposed to be the owner of the soil; but afterwards believing that Mrs. Clark was the owner, he applied to her to purchase the land: after that application, Mrs. Clark conveyed the premises to Viley, who, before bringing suit, ordered the defendant to leave the premises. Held, that the defendant could not set up an adverse possession of twenty years; though he might show that he made the application under a mistake, and prove a title out of the lessors of the plaintiff. *Jackson ex dem. Viley & Clark* v. *Cuerden*, 5 Johns. Cas. 353.

"The repeated acts of the defendant, recognizing the plaintiff's title by applications to purchase from him both before and after he entered into possession of the premises, afforded the strongest reason to presume that the defendant was in possession under David Russell (one of the lessors of the plaintiff.) We are accordingly of opinion that the plaintiff ought to have judgment." *Jackson ex dem. Russell et al.* v. *Croy*, 12 Johns. Rep. 430. (Per Yates, J., delivering the opinion of the Court.) *Et vide Jackson, ex dem. Brown et al.* v. *Ayres*, 14 Johns. Rep. 224.

which a jury may infer that a tenancy at will has been created between the parties.(*a*)

(*a*) *Doe d. Bennett* v. *Turner*, 7 M. & W. 226; S. C., 9 M. & W. 643.

A purchaser at a sheriff's sale becomes *quasi* tenant, and it is not to be presumed that he holds adversely. *Jackson ex dem. Klien* v. *Graham*, 3 Caines' Rep. 189. *Et vide Waring* v. *Jackson ex dem. Eden et al.*, 1 Peter's Rep. (Sup. Ct. U. S.) 570.

The possession of a defendant after a sale under an execution is not deemed adverse, for he becomes *quasi* a tenant at will to the purchaser. *Jacksom ex dem. Kanes* v. *Sternberg*, 1 Johns. Cas. 153. *Russell* v. *Doty, Sheriff, &c.*, 4 Cow. Rep. 576. *Et vide Langdon* v. *Potter et al.*, 3 Mass. Rep. 128.

A mortgagee, or direct purchaser from the tenant, or one who buys his right at a sheriff's sale, assumes his relation to the landlord, with all its legal consequences, and is as such estopped from denying the tenancy. *Willison* v. *Watkins*, 3 Peter's Rep. (Sup. Court, U. S.) 50.

One claiming under a deed from a judgment debtor has not such an adverse possession as will avoid a conveyance executed by a purchaser, under an execution upon a judgment. *Jackson ex dem. Scofield* v. *Collins*, 3 Cow. Rep. 89.

But in *M'Rae* v. *Smith*, [2 Bay's Rep. 339,] it was held: That possession of land five years, under a sale from defendant, who has a judgment against him, will be a good bar against a judgment creditor or those claiming under him, who has lain by that time without reviving his judgment, or bringing suit against such possessor.

In ejectment brought by Duval and Younghusband against Bibb, for a tract of land, the jury found a verdict for the plaintiffs subject to the opinion of the court on a case which stated that Robert Bibb, by deed dated the 13th December, 1788, and recorded on the 16th of the same month, conveyed the land to Graves. That Bibb was at that time, in actual possession, and had been so for upwards of twenty years. That Graves, on the 28th of November, 1793, conveyed to Duval and Younghusband.

That there was no proof "that Graves was ever in actual possession, or ever entered upon the premises for the purpose of executing the last mentioned deed; but that the defendant now, and always hath had, adverse possession of the premises against the said Graves and all holding by or under him, except as to the operation of the deeds aforesaid."

Pendleton, President, delivered the opinion of the court; he said:—As to the twenty years possession in Robert [Bibb,] prior to his conveyance to Graves, it only proves that he had a good title in ejectment, and a right to make that conveyance, and cannot operate as a bar by the act of limitation to the plaintiffs claiming under Graves, whose right of entry accrued only eight years before suit brought.

"The third and principal question is, whether the bargain and sale of Graves, (then out of possession,) to the plaintiffs passed his title to them? As an objection to its passing the title the statute and act of assembly against buying pretended titles, were relied on, as having in addition to the severe penalty on the buyer and seller of the land, made the conveyance void. It is unnecessary to consider whether those laws produced the effect contended for, since we are all of opinion that the purchase of the plaintiffs is not within the act of assembly, which has this exception: 'Unless the person conveying, or those under whom he claims, shall have been in possession one whole year next before.' [R. C. c. 102, § 1, ed. 1819.] Here Graves was the person conveying, and Bibb, the person in possession, was him under whom Graves claimed; so that, literally, Bibb is excluded from making the objection; and if it depended upon construction, could the plaintiffs possibly suppose, when they purchased, that

By section 8, when any person shall be in possession as tenant from year to year, or other period, without any lease in writing, the right

Bibb's possession was adverse to the title of Graves, to whom he had conveyed the land with a general warranty?

"The court are, therefore, of opinion on this point, that the title of Graves passed to the plaintiffs by the bargain and sale and gave them good title against Bibb: And upon the whole, that there is error in the judgment of the District Court which is to be reversed with costs, and judgment entered for the plaintiffs." *Duval et al.* v. *Bibb.*, 3 Call's Rep. 366.

In the case of *Pender* v. *Jones*, (2 Hyw. Rep. 294,) Taylor, J., said: "I am of opinion that a deliberate avowal on the part of the possessor, of title in the claimant, or a serious assent to the validity of his title, will render an entry or claim unnecessary, and is equivalent in its effect to an entry or claim."

The declaration of a widow in possession of premises, that she held them for her life, and that after her death, they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had twenty years adverse possession. *Doe ex dem Human* v. *Pettett*, 5 Barn. & Ald. Rep. 223.

Possession of land by consent of the true owner, is not adverse possession. *Atherton* v. *Johnson*, New Hamp. Rep. (R. & W.) 31.

A defendant in ejectment claiming the land by executory contract of purchase from the plaintiff, will not be permitted to contest the validity of the plaintiff's title. *Hamilton* v. *Taylor*, Litt. Sel. Cas. 444, 445.

"A mere contract for a deed, though the purchaser enter under it, does not place him in a situation to hold adversely, till he perform the condition of the purchase by paying the purchase money; such a possession not being hostile in its inception." *Jackson ex dem. Young & Devereaux* v. *Camp*, 1 Cow. Rep. 610. *Botts et al.* v. *Shields' Heirs*, 3 Littell's Rep. 34; *Et vide Voorhies* v. *White's Heirs*, 1 Marsh. Rep. (Ky.) 27.

A possession and claim of land, under an executory contract of purchase, is not such an adverse possession as will render a deed from the true owner void for champerty or maintenance; nor is it such an adverse possession as, if continued for twenty years, will bar an entry, within the statute of limitations: and especially, it is in no sense adverse as to the one with whom the contract is made. *Jackson ex dem Swartwout et ux.* v. *Johnson*, 5 Cow. Rep. 74. And to the same purport, *vide Proprietors of No. Six* v. *M'Farland*, 12 Mass. Rep. 325. *Higginbotham et al* v. *Fishback*, 1 Marsh. Rep. (Ky.) 506. *Wilkinson, &c.* v. *Nicholls*, 1 Monroe's Rep. 46. *Richardson et al* v. *Broughton*, 2 Nott & M'Cord's Rep. 417. *Fowke* v. *Darnall*, 5 Litt. Rep. 318. *Chills* v. *Bridge's Heirs*, Litt. Sel. Cas. 423. *Kirk et al.* v. *Smith ex dem. Penn*, 9 Wheat Rep. 288. *Et vide Jackson ex dem. Marvin et al.* v. *Hotchkiss*, 6 Cow. Rep. 401.

To constitute an adverse possession, it must not only be hostile in its inception, but the possessor must claim the entire title; for if it be subservient to, and admit the existence of a higher title, it is not adverse to that title. 5 Cow. Rep. 92. *Bott et al.* v. *Sheild's Heirs*, 3 Litt. Rep. 34. *Proprietors of Township No. Six* v. *M'Farland*, 12 Mass. Rep. 327. *Et. vide Knox et al* v. *Hook*, 12 Mass. Rep. 331.

Title by improvement, is merely a right of pre-emption, until the purchase is made from the commonwealth. Up to that time possession is not adverse to, but under the commonwealth; and, therefore, though it continue twenty-one years, it is no bar by the statute of limitations to the commonwealth, or her grantee. *Morris* v. *Thomas*, (in error), 5 Binney's Rep. 77.

But where a man, claiming under an executory contract for the purchase of land, is evicted and turned out of possession by a writ of *habere facias possessionem*, on an adversary claim,

of entry, &c., of the person entitled subject thereto, shall be deemed to have first accrued at the determination of the first of such years or

and he may purchase in such adversary claim, and assert it in defence, against a suit brought by the heirs of the man from whom he first purchased. *Chiles* v. *Bridge's Heirs*, Litt. Sel. Cas. 429.

A cottage standing in the corner of a meadow, (belonging to the lord of the manor,) but separated from it and from a high-road by a hedge, had been occupied for above twenty years without any payment of rent. The lord then demanded possession, which was reluctantly given, and the occupier was told that if he was allowed to resume possession it would only be during pleasure. He did resume and keep possession for fifteen years more, and never paid any rent; held, that the possession was not necessarily adverse, but might be presumed to have commenced by permission of the lord. *Doe ex dem. Thompson et al.* v *Clark*, 8 Barn. & Cres. Rep. 717.

It is an undoubted principle of law, fully recognized in this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates with full force to prevent the tenant from violating that contract by which he claimed and held the possession. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord; who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title and ready to be surrendered by its termination, by the lapse of time, or demand of possession. *Willison* v. *Watkins*, 3 Peter's Rep. (Sup. Ct. U. S.) 47.

The same principle applies to a mortgagor and mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another by a recognition of his title. *Willison* ve *Watkins*, 3 Peter's Rep. (Sup. Ct. U. S.) 48.

A holding of land under a bond from the patentee, cannot be considered as adverse thereto. *Fawks* v. *Darnall*, 5 Litt. Rep. 217

A person entering under a lease and holding over after his term has expired, will be regarded as holding by consent of the original landlord, and his possession is not adverse; and if he transfer the possession, his grantee is supposed to hold under the same title. *Brandter ex dem. Fitch* v. *Marshall*, 1 Caines' Rep. 401; *Jackson ex dem. Van Schaick et al.* v. *Davis*, 5 Cow. Rep. 123.

Where the relation of landlord and tenant exists, a conveyance of the latter of the demised premises, cannot operate as the basis of an adverse possession, so as to bar the former of his ejectment; whether the grantee knew of the devise or not. But this rule means the conventional relation of landlord and tenant, where some rent or return is in fact received to the former; not a relation arising from mere operation of law: as where one makes a grant, and, by the omission of the technical word heirs, an estate for life, only, passes.

In such case, after the death of the tenant for life, an adverse possession may commence running, in favor of those who enter and claim in fee under him, which, after twenty-five years, will bar all claim of the reversioner and his heirs. *Jackson ex dem. Webber et al.* v. *Harsen et al.*, 7 Cow. Rep. 323.

And where A. entered into possession of land under a lease in fee, reserving a pepper corn rent, in 1775, and in 1778, gave the land to B., by parol, who continued in possession, claiming under the lease, until 1798, excepting the period of the war, and a year or two after, and B. conveyed the promises to C., and C. to D., who conveyed the same to defendant; it was held, that this was a sufficient adverse possession to bar an action of ejectment

other periods, or at the last time when any rent payable in respect of such tenancy shall have been received, which shall last happen.

by the person having title to the land, commenced in 1807. *Jackson ex dem. Colden et al* v. *Moore*, 13 Johns. Rep. 513.

A., being the owner of certain lands in Lunenburgh patent, died, after having devised the same to his wife during her widowhood, remainder to B., and his other three brothers; a dispute having arisen between C., the daughter of B., and her husband, on one side, and the other devisees, on the other side, as to the portion of land to which she was entitled, her portion was ascertained and conveyed, in 1772, to C.'s husband; and certain persons were appointed by the deed to locate and reduce to severalty her share on any of the lands within the patent in the possession of the parties of the first part, (the other devisees and the widow of A.,) or their tenants; the defendant entered upon the premises in question twenty-three years before the trial, claiming title under the husband of C.; and, in an action of ejectment by persons claiming under A., it was held, that there was such an adverse possession in the defendant as barred the action, and that it could not be repelled by showing that he had obtained his possession from the tenants of the lessors of the plaintiffs, or their ancestors, as it was to be presumed, after such a lapse of time, that the persons appointed to locate the share of C. had located it upon lands in the possession of the tenants, as they were authorized to do. *Jackson ex dem. Livingston et al.* v. *Hallenbeck*, 13 Johns. Rep. 499.

When a tenant disclaims to hold under his lease, he becomes a trespasser, and his possession is adverse, and as open to the action of his landlord as possession acquired originally by wrong. The act is conclusive on the tenant. He cannot revoke his disclaimer and adverse claim so as to protect himself during the unexpired time of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right. *Willison* v. *Watkins*, 3 Peters' Rep. (Sup. Ct. U. S.) 49.

If the tenant disclaims the tenure, claims the fee adversely in right of a third person or in his own right, or attorns to another, his possession then becomes a tortious one, by the forfeiture of his right, and the landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his devise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment, he disclaims the tenancy and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and the tenant which can protect his possession from this adversary suit; and at the same time recover on the ground of there being a tenure so strong as that he cannot set up his adversary possession. Ibid.

A person who was a minor at the time of the death of his ancestor, has five years after he comes of age to bring his action for the recovery of his lands. *Rochell* v. *Holmes*, 2 Bay's Rep. 487; *et vide Saxon et ux.* v. *Barksdale et al.*, 4 Eq. Rep. (Desauss.) 522, 528; *Den ex dem. Park* v. *Cochran et al.*, 1 Hayw. Rep. 170.

"It being a clear principle of law, that a possessor cannot avail himself of prescription against minors." *Calvit* v. *Innis*, 10 Mart. Rep. 289. Per Mathews, J., delivering the opinion of the court. *Et vide Gayoso De Lemnos* v. *Garcia*, 1 Mart. Rep. (N. S.) 324.

A *feme covert* is allowed seven years after discoverture to sue for lands. *Gore et al.* v. *Marshall et al.*, 3 Marsh. Rep. (Ky.) 319.

Prescription does not run against the wife in favor of the purchasers of her property, although separated. *Proudhomme* v. *Dawson et al.*, 3 Mart. Rep. (N. S.) 161.

In the case of *Lamer* v. *Jones et al.*, (3 Har. & M'Hen. Rep. 328, 332, on appeal,) the bill

*When a right of entry occurs to a reversioner by reason of a forfeiture or breach of condition, advantage must be taken of such for-

stated that complainant's father mortgaged the premises, &c., on the 1st of October, 1756, subject to a clause of redemption on the 1st of October, 1757, and continued in possession till his death, in 1759, leaving a widow and complainant, his only child. After the death of complainant's father, the mortgagee took possession of the premises, and on the 28th of March, 1760, the heir of the mortgagee sold the land to the ancestor of the defendants, for £100. That the complainant, on the 7th of November, 1783, paid the mortgagee's agent the principal and interest due on the said mortgaged premises, and which were released to him. That the complainant tendered to the defendant the sum of £150; that the defendants have made considerable profits from the land, &c.

The defendants, in their answer, set up the length of time in bar to the complainant's claim and right of redemption. It appeared, from testimony, that the complainant was about twelve years old when his father died. The chancellor, Hanson, on the 9th of March, 1791, decreed that the complainant was not entitled to the relief prayed by his bill, and dismissed the same, assigning as his reasons, that "the time limited by law for making an entry into lands held under an adverse title having with great propriety been adopted by the court of chancery in England, for barring the redemption of lands held peaceably under a mortgage, after the day of payment; and the said limitation having already been adopted by this court, and the time within which an entry may be made on lands held by an adverse title, being either twenty years after the right accrued, or ten years after the arrival at full age, in case the right accrued to the person claiming during his infancy; and the chancellor being of opinion, that inasmuch as the legislature of this state did not think proper to suspend, during the late war, the operation of the acts of limitation, with respect to a right of entry, (as it did in other cases,) this court ought not by allowing a suspension, to introduce a variance between the rules of law and the rules of equity, which have so often, by chancellors in England, been declared the same with respect to the limitation of suits; and the chancellor being further of opinion, that even if a suspension be allowed by this court, it could not be allowed for more than four years, it being well known that during the war there was no obstruction to the prosecution of suits in this court for more than the said number of years, since the possession of the mortgagee, and almost twenty years, since the arrival at full age of the complainant, had elapsed before the filing of this bill. It is, therefore, this 9th day of March, 1791, by the chancellor and the authority of this court, adjudged, &c., that the complainant is not entitled to the relief prayed by his bill, and that the said bill be dismissed, but without costs."

But this cause being carried up by appeal, the Court of Appeals, in June, 1793, gave the following opinion:

"It is laid down as a rule, that mortgages are held not to be within the statute of limitations; but it was thought reasonable to establish a period at which, *prima facie*, the right of redemption shall be presumed to be deserted by the mortgagor, unless he be capable of producing circumstances to account for his neglect; and chancery having adopted a variety of those circumstances, to wit: fraud, acknowledgment, infancy, ignorance, lawsuits, &c., of most of which the parties cannot avail themselves at common law, there is certainly a deviation in such cases from its strictness.

"No case has been cited to show that Courts of Chancery have adopted that part of the clause of the statute of 21 Jac. I., which allows infants the liberty, after the twenty years are expired, to bring actions within ten years after their coming to full age; and the judges

feiture within twenty years next after the forfeiture was incurred, or the condition broken; but by section 4, it is provided, that if no advantage be taken by the reversioner of such forfeiture or breach of condition, then, notwithstanding such forfeiture or breach of condition, his right shall be deemed to have first accrued in respect of such estate at the time when the same shall become an estate in possession, as if no such forfeiture or breach of condition had happened.

By section 9, it is enacted, that when any person shall be in possession by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards is reserved, and the rent so reserved shall have been received by some wrongful claimant to such land in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved shall afterwards

after diligent search, not being able to find any, although from the year 1624, in which the statute was made, to the year 1793, many cases, in all probability, have happened; an inference may be drawn from thence that the doctrine prevailed, that when adverse possession was taken from the infant, limitations did not run on him until his full age, and that this doctrine is not impeached in the *dictum* of Lord Talbot, in Belch & Harvey, as it is not an adjudged case; but on the contrary, there are adjudged cases where infancy, lawsuits and other circumstances, have excused the party, and where an infant being plaintiff, adverse possession was taken of him six years before he came of age, and that period being accounted for by infancy, although twelve years had elapsed after his coming of age before bill filed; yet, as it did not amount to twenty years, he had a right to bring his bill, and the party here being similarly circumstanced, being six years an infant, and bringing his bill in time, if the six years be not accounted as part of the time. We do, therefore, order and adjudge that the decree of the Chancellor be reversed, and that the appellant have liberty to proceed before him on the bill, and that he hear the cause upon the merits, according to the course of that court." Et vide *Trustees of Lexington* v. *Lindsay's Heirs*, 2 Marsh. Rep. (Ky.) 445; *Higginson, Survivor, &c.*, v. *Air et al.*, 1 Eq. Rep. (Dessaus.) 427.

The limitation act of 1814 [Kentucky] operates on conveyances made by non-residents to residents before the passage of the act, so as to take away the ten years allowed by the act of 1796, to commence suit after return to the state. *Luckett* v. *Dunn et al.*, 3 Litt. Rep. 218.

In the case of *Pancoast's Lessee* v. *Addison*, (1 Har. & Johns. Rep. 350, 356,) it was held, that a non-resident of the state, [Maryland] but who is a resident of one of the United States, is not barred by the statute of limitations in an action of ejectment. And Chase, Ch. J. said; "The statute of limitations with the savings is a beneficial law for the purpose of quieting possessions, &c., but without the savings it would be a rigorous and unjust law. It does not extend to persons out of the state, who cannot be supposed to know the law." Et vide *Brent's Lessee* v. *Trasker*, 1 Harr. & M'Hen. Rep. 89.

The terms "beyond seas," in the proviso or saving clause of a statute of limitations, are equivalent to without the limits of the state where the statute is enacted; and the party who is without those limits is entitled to the benefit of the exception. *Murray's Lessee* v. *Baker et al.*, 3 Wheat. Rep. 541; *Shelley et al., Ex'rs*, v. *Guy*, 11 Wheat. Rep. 361; *Pancoast's Lessee* v. *Addison*, 1 Harr. & Johns. Rep. 350.

Contra, *Ward* v. *Hallam*, 2 Dall. Rep. 217.

have been made to the person rightfully entitled thereto, the right of such rightful person subject to such lease, to make an entry, or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by such wrongful claimant, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Thirdly, with respect to the issue of tenants in tail.

If tenants in tail die seised, the issue must bring their action within twenty years after the death; but if he do not die seised, then, if he were then barred, his issue would be barred also. But if he were not then barred, the twenty years not having then expired, his issue has, by section 22, the same time within which to bring his action that the tenant in tail would have had if he had lived.

*And by section 23, when a tenant in tail shall have made an assurance, not operating to bar estates to take effect after, or in defeasance of his estate tail, and any person shall by virtue of such assurance be in possession, and the same person, or any other person whatsoever (other than some person entitled to such possession in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue in such possession for twenty years next after the commencement of the time at which such assurance, if it had been executed by such tenant in tail, or the person who would have been entitled to his estate tail, if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estates as aforesaid; then, at the expiration of such period of twenty years, such assurance becomes an effectual bar against any person claiming any estate whatsoever, to take effect after or in defeasance of such estate tail.

Fourthly, as to mortgagees.

When neither principal or interest has been paid upon a mortgage, the time of limitation begins to run from the date of the conveyance, unless it contain some stipulation to the contrary.(*a*)

Fifthly, as to personal representatives.

(*a*) *Doe d. Roylance* v. *Lightfoot*, 8 M. & W. 553.

The executor or administrator of a person who was in possession at the time of his death, must, by section 2, bring his action within twenty years after the death of the testator or intestate; but if the testator or intestate were not in possession at the time of his death, then the representative must bring his action within the same time in which the deceased must have sued, if he were still living. And for the purposes of this act by section 6, in cases of administration, the interval of time between the death and the grant of the letters of administration is reckoned.

Sxthly, as to ecclesiastical persons.

By section 29 it is provided, that any spiritual, or eleemosynary corporation sole, may make an entry, or bring his action within the following periods, next after the time at which the right shall first have accrued; (that is to say), the period during which two persons in succession shall have held the office or benefice in respect whereof such land shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies, and such term of six years taken together shall amount to the full period of sixty years; and, if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years, as well with the time of holding of such two persons, and such six years make up the full period of sixty years.

Lastly, as to persons under legal disabilities.[1]

[1] "It was declared, in *Jackson* v. *Schoonmaker*, (4 Johns. Rep. 390,) to be the law, that the statute of limitations did not affect the right of a remainderman during the continuance of a particular estate; nor would the acts or *laches* of the tenant of the particular estate, affect the party entitled in remainder. The right of entry of the lessor did not accrue, and could not exist during the estate of the curtesy." *Jackson ex dem. Beekman* v. *Sellick*, 8 Johns. Rep. 266: *et vide Martin* v. *Woods*, 9 Mass. Rep. 377; *Heath et ux.* v. *White*, 5 Conn. Rep. 228; *Doe ex dem. Colclough et ux.* v. *Hulse*, 3 Barn. & Cress. Rep 757; *Doe ex dem. Miller* v *Brightwen*, East's Rep. 583.

"The statute would work great injustice, if it were held to affect the rights of reversioners or remaindermen during the continuance of the particular estate. Such was the view of the statute taken by this court, in *Jackson ex dem Schoonmaker*, (4 Johns. 390,) and *Jackson* v. *Sellick*, (8 Johns. 262.)" *Jackson ex dem. Swartwout et ux.* v. *Johnson*, 5 Cow. Rep. 96. (Per Sutherland, J.; and the like opinion is given by Savage, Ch. J., at pages 102, 103.)

If a person has not a right of entry, but only a possibility which may give a right of entry at a future day, the statute does not run against him until that right accrues. Hence, notwithstanding the next heir in tail releases to the tenant in tail in possession, the statute does not run against the releasor, until the death of the tenant in tail without issue. *Lessee of Hall* v. *Vandegrift et al.*, 3 Binn. Rep. 374.

By section 16, it is provided, that persons laboring under any of the following disabilities at the time of their rights first accruing, that is to

In the case of *Stewart* v. *Jackson*, (1 Marsh. Rep. (Ky.) 59, on appeal,) Owsley, J., who delivered the opinion of the court, said: "The appellee relied upon an adverse possession for twenty years; but, as the appellant's right of entry is shown to have accrued within twenty years, according to the case of *Chiles* against *Calk*, (4th Bibb, 544,) the court improperly held this action to be barred by such a possession." *Et vide Finlay et al.* v. *Humble et al.*, 2 Marsh. Rep. (Ky.) 570; *Murray, Adm'r.*, &c., v. *The East India Company*, 5 Barn. & Ald. Rep. 204.

The right of entry on land accrues only with the emanation of the grant, and then the statute commences running. *Fowke* v. *Darnall*, 5 Litt. Rep. 318.

Copyhold lands were granted to A. for the lives of herself and B., and in reversion to C. for other lives. A. died, having devised to B., who entered and kept the possession for more than twenty years. On his death, C. brought ejectment: held, that the action was barred by the statute of limitations, for that C.'s right of possession accrued on the death of A., inasmuch as there cannot be a general occupant of copyhold land. *Doe ex dem. Foster et al.* v. *Scott*, 4 Barn. & Cress. Rep. 706.

"If there be two rights of entry, one may be lost without impairing the other." *Stevens et ux.* v. *Winship et ux.*, 1 Picker. Rep. 327; *Wells* v. *Prince*, 9 Mass. Rep. 509; *Wallingford* v. *Hearl*, 15 Mass. Rep. 472; *Jackson ex dem. M'Crea* v. *Mancius et al.*, 2 Wen. Rep. 366.

In the case of *Jackson ex dem. Swartwout et ux.* v. *Johnson*, (5 Cow. Rep. 103,) Savage, Ch. J., said: "At what perid of time, I would ask, was it in the power of the heirs of Mrs. Cooper to have asserted their rights before 1817, when Thomas Cooper (he was tenant by the curtesy) died? Their infancy, I admit, is no excuse for them, as successive disabilities are not allowed. The statute was not operative until the death of Mrs. Cooper. It is true, indeed, that more than twenty years have elapsed since the adverse possession commenced; and more than ten years since the last disability was removed, which existed when the disseisin took place; but I would ask, when were the claimants guilty of laches? They were not bound to make an entry or claim till the death of Mrs. Cooper. And from that period till the death of the tenant for life, the law would not permit them to enter. Shall laches, then, be imputed to them? Certainly not. Whether Colden Cooper was born before or after the disseisin, seems to me not to change the rights of the parties. The lessors of the plaintiff have brought their action within ten years after the action of the operation of the statute upon their claim, and are not barred by it." *Et vide* ibid. 95, 96; (same case,) for a similar opinion by Sutherland, J.

"The general rule is, that when the statute of limitation once begins to run, it continues to run, notwithstanding any subsequent disability." *Peck* v. *Randall's Trustees*, 1 Johns. 176. (Per Kent, Ch. J., delivering the opinion of the court.) *Et vide*, to the same point, *Crozier* v. *Gano et ux.*, 1 Bibb's Rep. 261. *Fewell et ux* v. *Collins*, 1 Constit. Rep. So. Car. 202. *Den ex dem. Andrews* v. *Mulford*, 1 Hayw. Rep. 321, 322. *Anon.*, 1 Hayw. Rep. 416. *Fitzhugh* v. *Anderson et al.*, 2 Hen. & Munf. Rep 289. *Mooers* v. *White et al.*, 6 Johns. Ch. Rep. 372. *Dow* v. *Warren*, 6 Mass. Rep. 238. *Hudson* v. *Hudson's Adm'rs et al.*, 6 Munf. Rep. 352. *Den ex dem. Pearce et al.* v. *House*, 3 Nor. Car. Law Rep. 305. *Lessee of Hall* v. *Vandegrift*, 3 Binn. Rep. 374. *Faysoux* v. *Prather*, 1 Nott. & M'Cords's Rep. 296. *Croddoch's Lessee* v. *Stalcup*, 1 Ten. Rep. 353. *Walden* v. *The Heirs of Gratz*, 1 Wheat Rep. 296. *Lessee of Neilly* v. *M'Cormick*, 2 Yeates' Rep. 448. *Cotterel* v. *Dutton*, 4 Taunt. Rep. 830. *Wells* v. *Newbolt*, Cam. & Norw. Rep. 407. *Rogers* v. *Hillhouse* 3 Conn. Rep. 398. *Adamson, Adm'r, &c.*, v. *Smith*, 2 Rep. Const. Ct. So. Car. 269. *Langford's*

say infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person or the person claiming through him, may,

Adm'rs v. *Gentry*, 4 Bibb's Rep. 468. *Doe ex dem. Pritchard et al.* v. *Lawyer*, 1 Hawk's Rep. 337. *Jones, Adm'r, &c.*, v. *Brodie, Adm'r, &c.*, 3 Murph. Rep. 594.

The same construction given to the statute of fines. *Goodright ex dem. Fowler et al* v. *Forester et al.*, 1 Taunt. Rep. 578.

An estate devised to executors, or such of them as shall qualify, is a contingent executory devise, and does not vest until that event occurs; until then the title descends to the heirs. And where, in such case, after the testator's death, but before the qualification of the executors, and whilst his heirs were infants, an entry was made on part of their land under a junior patent; it was held, that the statute of limitations did not commence running, until the qualification of the executors, or one of them. *May's Heirs* v. *Hill*, 5 Litt. Rep. 308.

"With regard to executory devises, whether certain or contingent, it is one of their properties that they cannot be aliened or barred by any mode of conveyance, whether by recovery, fine, or other act. Therefore, executory devises preserve the estate from injuries against the particular estate, and thus create a kind of perpetuity, on which courts have placed sundry restrictions. *May's Heirs* v. *Hill*, 5 Litt. Rep. 312, 313. (Per Mills, J., delivering the opinion of the court.)

"It is an established rule, that when the statute begins to run, it continues to run without interruption, from the death of the claimant." *Beauchamp, Adm'r, &c.*, v. *Mudd*, 2 Bibb's Rep. 538. (Per Boyle, Ch. J., delivering the opinion of the Court.) *Et vide* n. [2], *supra.*

But under the statute of limitations of Kentucky, the saving whereof is in favor of those who were or shall be infants, &c., "at the time when the said right or title accrued or coming to them." It was held, that if the statute begins to run against the ancestor, but by his death the land descends to his heirs, who are infants, the statute does not run on, but the infant shall have the time allowed by the statute after arriving at full age, to bring their action. *Machir, &c.*, v. *May, &c.*, 4 Bibb's Rep. 44, *et vide Floyd's Heirs* v. *Johnson et al.*, 2 Litt. Rep. 114. *May's Heirs* v. *Bennett*, 4 Litt. Rep. 314. *M'Intire's Heirs* v. *Funk's Heirs*, 5 Litt. Rep. 35.

The infancy of one tenant in common will not prevent the statute of limitation from running against a co-tenant. *Thomas* v. *Machir, &c.*, 4 Bibb's Rep. 412.

A party claiming the benefit of the proviso in the statute of limitation, can only avail himself of a disability existing when his right of action first accrued. *Jackson ex dem. Roosevelt et al.* v. *Wheat*, 18 Johns. Rep. 40. *Kendall* v. *Slaughter*, 1 Marsh. Rep. (Ky.) 377.

In this case of *Crozier* v. *Gano et ux.*, (1 Bibb's Rep. 260,) Trimble, J., delivering the opinion of the court, said: "The evident design of the replication is to show that the plaintiff Keziah, from the time her cause of action first accrued, has at all times, (until within 5 years next before the commencement of the suit,) labored under the disabilities of either infancy, coverture, or absence from the country, so as to bring her within the savings of the statute of limitations. If the replication had really shown this, it would have been good; for although one of them, as infancy, for example, had been removed, yet if another of them occurred, as marriage, before the removal of that of infancy, and so on in succession, so that all were not removed at any one time, whereby the statute could attach and begin to run, it would have been a sufficient answer to the plea; [of the statute of limitation:] this the replication has not done." *Et vide Eaton* v. *Sanford*, 2 Day's Rep. 523.

notwithstanding the period of twenty years shall have expired, make an entry, or distress, or bring an action at any time within ten years

In the case of *Cotterell* v. *Dutton*, (4 Taunt. Rep. 830,) Chambre, J., said: "The ten years do not run at all while there is a continuance of disabilities, but they run without intermission from the time that the disabilities first ceased."

But in the case of *Bunce et al.* v. *Wolcott*, (2 Conn. Rep. 27,) it was held, that the saving of the statute of limitations regarding the right of entry into lands (tit. 97, c. 3,) applies only to such disability as existed at the time the right of entry accrued, and not to any supervenient disability. *Et vide Thompson et al.* v. *Smith*, 7 Serg. & R. Rep. 209.

"It is equally well settled that cumulative disabilities cannot be allowed." *Jackson ex dem. Swartwout et ux* v. *Johnson*, 5 Cow. Rep. 101. (Per Savage, Ch. J.) *Et vide* opinions of Sutherland, J., and Woodward, J., to the same point, pages 95 and 105, (same case.)

If a non-resident comes into the state temporarily, and returns to his dwelling without the state, the statute of limitations begins to run against him. *Doe ex dem. Smith* v. *Harrow, &c.*, 3 Bibb's Rep. 446. *Robertson, &c.* v. *Smith's Heirs*, Litt. Sel. Cas. 295.; *May's Heirs* v. *Slaughter*, 3 Marsh. Rep. (Ky.) 505, 507. In this last cited case the court said, (Boyle, Ch. J., delivering the opinion:) "We have no doubt, assuming the facts as true, that the statute commenced running against John May in his lifetime. At the separation of this state from Virginia we made the statute of that state ours by adoption, and in its turns [terms] it then applied to the limits of this state which were the former limits of the district, and its expressions were retrospective, as to all previous as well as subsequent entries upon land, so that by the separation of the two states, the effect of the statute did not cease. John May having been in the limits of the district, after the adverse entry and possession of the appellee, the statute attached and took effect against him, although his residence was not within the district, as was decided by this court in the case of *Smith* v. *Hannon*, [*Harrow*,] 3 Bibb, 440." [446.]

Co-parceners whose right of entry is barred by the statute of limitations, cannot recover in ejectment by joining with them one whose right is saved; each, or any number being capable of vindicating his or their own right without joining the others. *Sanford et ux. et al.* v. *Button*, 4 Day's Rep. 301.

An estate descending to a plurality of persons under our [Kentucky] act of descents, is a joint estate, so far that in an ejectment brought by parceners, if any one of them is out of the saving in the act of limitation, all will be. *Robertson, &c.* v. *Smith's Heirs*, Litt. Sel. Cas. 296, 297.

Where the right of one tenant in common is protected by her coverture, the right of the other, who is under no disability, is not thereby saved. *Doolittle et ux.* v. *Blakesley*, 4 Day's Rep. 265; *Bryan et al.* v. *Hinman*, 5 Day's Rep. 211; *M'Intire's Heirs* v. *Funk's Heirs*, 5 Litt. Rep. 34, 35; *Dex* v. *Fen & Alexander*, 1 Dev. 321.

If one of the persons against whom a decree is given, be an infant, his infancy will prevent the statute of limitations from barring those who must necessarily join with such infant in a writ of error to reverse such decree. *Kennedy's Heirs* v. *Duncan, &c.*, 1 Hardin's Rep. 365: Et vide *May's Heirs* v. *Bennet*, 4 Litt. Rep. 314.

In the case of joint rights, all the complainants must labor under some legal disability, provided for by the statute, to prevent the acts operating as a bar. *Smith, &c.* v. *Corney et al.*, 1 Litt. Rep. 297.

In a joint estate to several persons, if the right of entry is tolled as to some, all are barred; but it is otherwise if it be "an estate in severalty, or in common." *Dickey* v. *Armstrong's Heirs*, 1 Marsh. Rep. (Ky.) 39, 40; *Robertson, &c.* v. *Smith's Heirs*, Litt. Sel. Cas. 296; *Ro-*

next after the time at which the person to whom such right shall have first accrued as aforesaid, shall have ceased to be under any such dis-

bert's Heirs v. *Ridgeway*, Ibid. 394; Et vide *Turner et al. Ex'rs.* v. *Debell, Ex'r.*, 2 Marsh. Rep. (Ky.) 384; *Simpson et al.* v. *Shanon's Heirs*, 3 Marsh. Rep. (Ky.) 462; *Marsteller et al*, v. *M'Clean*, 7 Cranch's Rep. 156.

In the case of *Doe ex dem. Langdon* v. *Rowlston*, (2 Taunt. Rep. 446,) Mansfield, Ch. J., delivering the opinion of the Court, said, "In this case were two demises, and a verdict passed for the plaintiff, on the second demise by Elizabeth Langdon, the fact being, that the estate descended to Elizabeth Langdon, a *feme covert*, and Mary Peart, in parcenary, and that twenty years elapsed without Mary Peart's entering. And the only question was, whether the lessor of the plaintiff was not entitled to judgment on the first count, on the idea that as Elizabeth Langdon was under a disability at the time of the descent cast, that circumstance was to operate in favor of the other co-parcener. Upon the hearing of the argument, we were, and are now, of opinion, that the entry of Elizabeth Langdon cannot give a right of entry to Barrett, [he was the son and heir of Mary Peart, then deceased,] whose right was before barred by the statute of limitations; but that the judgment must be for the lessor of the plaintiff for the moiety only."

Under the act of Kentucky, of 1797, taken in connection with preceding acts, declaring that entries for lands shall become void, if not surveyed before the first day of October, 1798, with a proviso allowing to infants and *femes covert* three years after their several disabilities are removed to complete surveys on their entries; it was held, that if any one or more of the joint owners be under the disability of infancy or coverture, it brings the entry within the savings of the proviso as to all the other owners. Distinction between this statute and a statute of limitations of personal actions. *Shipp et al.* v. *Miller's Heirs*, 2 Wheat Rep. 217; *Kennedy et al.* v. *Bruice*, 2 Bibb's Rep. 371.

And where B., who owned a certificate of such entry, assigned his claim to H., an adult, and B. died within the time for surveying entries: held, that neither B., nor his heirs being responsible for the title, after the assignment, to H., the infancy of B.'s heirs did not save the entry from forfeiture for not being surveyed in time. *Hart's Heirs, &c.* v. *Benton's Heirs, &c.*, 3 Bibb's Rep. 420.

The 5th section of the limitation act of 26th March, 1785, [Pennsylvania,] is binding on infants where there has been no possession of lands improved for seven years next before action brought *Lessee of Mobley et al.* v. *Ocker*, 3 Yeates Rep. 200.

Neither the act of 1800 [North Carolina] repealing the laws granting escheated lands to the university, nor bringing a suit by the escheator under the act of 1801, suspends the statute of limitations as to the trustees whose right was sought to be divested by those acts. *Den ex dem. Trustees of the University* v. *Campbell*, 1 Murph. Rep. 185.

There is no saving in the statute of limitations, for any disability in the heir supervenient to the disability of the person to whom the right of entry first accrued. *Griswold* v. *Butler et ux.*, 3 Conn. Rep. 227. (Per Bristol, Chapman and Brainard, Js. *Contra*, Hosmer, Ch. J., and Peters, J.)

Where an adverse possession has commenced in the lifetime of the ancestor, the operation of the statute of limitations is not prevented by the title descending to a person under legal disability, as a *feme covert*, &c. *Jackson ex dem. Livingston et al.* v. *Robins*, 15 Johns. Rep. 169.

Where an adverse possession begins to run in the lifetime of the ancestor, and the land descends to an infant heir, the latter is not protected by his disability. *Jackson ex dem. Colden et al.* v. *Moore*, 13 Johns. Rep. 513.

ability, or shall have died, which shall have first happened, but it is provided nevertheless (by section 17,) that after the expiration of forty years next after the time at which any such right to make an entry, or bring an action shall have first accrued, such right shall be effectually bound, although the person under disability at such time may have remained under disability during the whole of such forty years, or although the *term of ten years, from the time at which he shall have ceased to be under any such disability or have died, shall not have expired. And by section 18, when any person under disability at the time at which his right first accrued shall die without having ceased to be under such disability, no time to make an entry or to bring an action beyond the twenty years next after the right of such person first accrued, or the ten years next after the time at which such person died, shall be allowed by reason of any disability of any other person.

"We have not forgotten that it has been decided by this court, that, under our statute, if a right of action accrues to one laboring under no disability, and, by his death, the right descends upon his heir, who does labor under some disability, the right of the latter will be saved until ten years after such disability is removed; but we have never decided that one disability can be added to another," &c. "When, therefore, a right of action has once accrued, or come to a person laboring under a disability, and that disability is removed, or the person so disabled has died, it is obvious that the statute has provided for no other or successive disability; and to permit such disability to cumulate and save the right, would be adding to the statute, and giving to it an operation contrary to its import." *Floyd's Heirs* v. *Johnson et al.*, 2 Litt. Rep. 114. Per Curiam.

"There is no doubt that a party has, in every event, twenty years to make an entry; and if under disability when the right or title of entry first accrued, then such person may, notwithstanding twenty years have expired, bring an action or make an entry, within ten years after the disability is removed." *Jackson ex dem. Corson et al.* v. *Cairns et al.*, 20 Johns. Rep. 306. Per Spencer, Ch. J., delivering the opinion of the court. *Et vide Jackson ex dem. Swartwout et ux.* v. *Johnson*, 5 Cow. Rep. 94, 101, 105; *Demarest et ux. Wyncoop et al.*, 3 Johns. Ch. Rep. 137.

"It is perfectly well settled, that if several disabilities exist when the right of action accrues, the statute does not begin to run till the party has survived them all. 3 Johns. Ch. Rep. 138; 1 Plowd. 375." *Jackson ex dem. Swartwout et ux.* v. *Johnson*, 5 Cow. Rep. 101. Per Savage, Ch. J. *Et vide* opinion of Woodworth, J., page 105, and opinion of Southerland, J., page 94, (same point.)

"A person may be under several of the disabilities specified, at the time the title accrues; and in such case the person so situated may avail him or herself of either; and it will always be a sufficient answer to an object or to such an election, to say, the disability on which I rely is pointed out by the proviso; it existed at the time my right or title accrued; I have prosecuted my claim within the time allowed after its discontinuance, and come within both the letter and spirit of the law." *Bunce et al.* v. *Walcott*, 2 Conn. Rep. 34. Per Edmond, J.

But, in the case of *Pender* v. *Jones*, (2 Hayw. Rep. 294,) Taylor, J., said: "I am of opinion that, if seven years be completed at a period of time, occurring after arrival at full age, when part of the seven years elapsed during infancy, that the party has three years from arrival to age to make his entry or claim, and no more."

2. As to the nature of the claimant's title.

The word title is here used in its ordinary signification, as denoting the claimant's legal, that is to say, actual right to the disputed property. Whenever the defendant has been let into possession by the lessor, or those under whom he claims, he is estopped from disputing the title in this sense of the word,(*a*) although he may show its subsequent expiration,(*b*) and it is only incumbent on the claimant in such cases, to show the manner in which the defendant obtained possession, and that his right to such possession has ceased. These cases chiefly arise where the relationship of landlord and tenant has subsisted between the parties, and will be treated of in a subsequent chapter. The present consideration is limited to those cases in which it is incumbent upon the claimant to show some title to the possession beyond the mere cessor of right in the defendant to continue therein; and it may be convenient shortly to consider, under separate heads, the particular persons, who, by reason of their estate and interest in the lands, are entitled to maintain ejectment, and the rules by which those rights have been regulated.

*1. Tenant for years—for life—in tail—or in fee.

[*60] It has been said by a learned writer, that a tenant for years cannot, before entry, maintain an action of *trespass, or *ejectment;* because those acts complain of a violation of the possession, and therefore cannot be maintained by any person who has not had an actual possession ;(*c*) but, this reasoning does not seem applicable to the modern principles of the remedy by ejectment.(*d*)[1]

(*a*) *Sullivan* v. *Stradling*, 2 Wils. 208; *Driver d. Oxenden* v. *Lawrence*, Blk. 1259; *Parker* v. *Manning*, 7 T. R. 537; *Hodson* v. *Sharpe*, 10 East, 355; *Doe d. Prichett* v. *Mitchell*, 1 B. & B. 11.

(*b*) *England d. Syburn* v. *Slade*, 4 T. R. 682; *Doe d. Jackson* v. *Ramsbottom*, 3 M. & S. 516; *Doe d. Lowdon* v. *Watson*, 2 Star. 230; *Baker* v. *Mellish*, 10 Ves. jun. 544; *Gravenor* v. *Woodhouse*, 1 Bing. 38; *Phillips* v. *Pearse*, 5 B. & C. 433.

(*c*) 1 Cru. Dig. 248, *et vide*, 4 Bac. Ab. 183.

(*d*) *Coodright d. Hare* v. *Cator*, Doug. 477, 86.

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[1] "An action of ejectment, although in form a fiction, is in substance a remedy pointed out to him who has a right to land, of which he is wrongfully deprived; it is the title of the

2. MORTGAGEE.[1]

After the mortgage becomes forfeited, the mortgagee may immedi-

lessor, and not of the nominal lessee, that is to be decided." *Carroll et al. Lessee* v. *Norwood's Heirs*, 5 Harr. & Johns. Rep. 173. Per Johnson, J., delivering the opinion of the court.

Lessor, lessee, under lessee: in a lease from lessee to under lessee, it was provided, that, if under lessee were guilty of a breach of covenant, lessee and lessor might enter:

Held, that on a breach of covenant in the lease to under lessee, ejectment might be maintained by lessee alone. *Doe d. Bedford et al.* v. *White*, 4 Bingh. Rep. 276.

A testator gives a farm to his son in fee, upon condition *inter alia*, that his daughters shall have the use and occupation of a room in his dwelling-house, and be provided with food, raiment, and fuel, so long as they remain unmarried, and there be a breach of the condition. An action of ejectment lies by the daughters for the recovery of the shares of the farm to which they would have been entitled, as heirs at law of their father, and such condition is annexed to the estate, and binds the lands in whose hands soever it may be. *Hogeboom* v. *Hall*, 24 Wen. 146.

See *Morss* v. *Doe*, 2 Carters Ia. Rep. 65; *Tilghman et al.* v. *Little*, 13 Illinois Rep. 239; *Wood* v. *Turner*, 7 Humph. 517; *Jackson* v. *Davis*, 5 Cowen, 123; *Henley* v. *Bank*, 16 Ala. Rep. 552; *Cooper* v. *Smith*, 8 Watts. 536; *Riley* v. *Million*, 4 J. J. Marshall Rep. 395; *Binney* v. *Chapman*, 5 Pick. 124; *Jackson* v. *Spear*, 7 Wen. 401; *Camp* v. *Camp*, 5 Conn. 291; *Anderson* v. *Darby*, 1 Nott. & M'Cord, 369.

TENANT IN TAIL.

[1] The widow of an intestate cannot join with the heirs in bringing ejectment for the lands of the deceased. *Pringle et al.* v. *Gaw*, 5 Serg. & R. Rep. 536.

If she join with the heirs in the ejectment, the heirs cannot recover judgment alone. Ibid.

In the state of New York, in an action under the code, to recover real property corresponding to the former action of ejectment, when the wife is the owner of the fee and the husband tenant by the curtesy initiate, the husband and wife may join in the action. *Ingraham* v. *Baldwin*, 12 Barb. Supr. Ct. Rep. 9.

See *Doe ex dem. Cook & Hardy* v. *Webb*, 18 Ala. Rep. 810.

Husband and wife take by deed, the husband may, it seems, give a lease in his *own name* for the purpose of bringing ejectment. *Jackson* v. *Mc Connell*, 19 Wen. 175.

It is not necessary that wife should join with husband in ejectment for recovery of land conveyed to husband and wife. *Jackson* v. *Leslie*, 19 Wen. 339.

A married woman may disseise another without the assent of her husband; but when a husband is in possession of land, in right of his wife, a writ of entry must be brought against both. *Little* v. *Gardener*, 5 New Hamp. Rep. 415.

See *Moore* v. *Pearce*, 2 Har. & M'Hen. Rep. 236; *Den* v. *Stockton*, 7 Halst. Rep. 322; *Ely* v. *M'Guire*, 2 Ham. 223.

In ejectment by mortgagee against mortgagor, it is not necessary to demand posession before action brought. Where the mortgagee suffers the mortgagor to remain in possession of the mortgaged premises, the latter is not tenant at will to the former, but at most, tenant by sufferance only; and may be treated either as tenant or trespasser at the election of the mortgagee. *Doe ex dem. Robey* v. *Maisey*, 8 Barn. & Cres. Rep. 767.

ately proceed by ejectment against the mortgagor without any notice or demand of possession.(*a*)

(*a*) *Doe d. Fisher* v. *Giles*, 5 Bing. 421; S. C., 2 M. & P. 49.—The difficulties with which the Courts have been beset, in defining the situation of a mortgagor in possession, after a forfeiture of the mortgage, with respect to his mortgagee, are curious. In *Moss* v. *Gallimore*, Doug. 279, 82, Lord Mansfield says, "He is not properly a tenant at will to the mortgagee; he is like a tenant at will." In *Buck* v. *Wright*, 1 T. R. 381, Ashurst, J., says, "a mortgagor is as much, if not more like a receiver than a tenant at will; in truth, he is not either;" and again, "Mortgagors and mortgagees are characters as well known, and their rights, powers, and interests, as well settled, as any in the law." In *Partridge* v. *Ball*, 5 B. & A. 604, it is said, *Per Curiam*, "a mortgagor is a tenant within the strictest definition of that word;" and the learned reporter commences a long note in the case reported, with this sentence, "As long as the mortgagor or his heir is in possession of the land, and the legal ownership is in the mortgagee, there must subsist a tenancy between the parties;" whilst in *Doe d. Robey* v. *Masey*, 8 B. & C. 767, Lord Tenterden says, "The mortgagor is not in the situation of tenant at all, or at all events, he is not more than a tenant at sufferance, but in a peculiar character, and liable to be treated as tenant or as trespasser at the option of the mortgagee."

In an action of ejectment by a mortgagee against a mortgagor, the latter may set up an eviction under a paramount title in bar of a recovery. *Jackson* v. *Marsh*, 5 Wen. 44.

The title of a mortgagee under a mortgage satisfied after forfeiture, may be set up as a defence to an action of ejectment. *Smith* v. *Vincent*, 15 Conn. Rep. 1.

A mortgagee in possession of mortgaged premises lawfully acquired after condition broken, cannot be dispossessed by an action of ejectment. The revised statutes have not altered the law in this respect. *Phyfe* v. *Riley*, 15 Wen. 248.

A mortgagee, after the day of payment past, may bring an action of ejectment against the mortgagor, without notice to quit, or demand of possession. *Fuller* v. *Wadsworth*, 2 Iredell's Rep. 263.

If, while an action of ejectment is pending in court, a decree of foreclosure be obtained by a third person against the plaintiff for the premises demanded, such decree, if the time of redemption be unexpired, will not prevent a recovery by the plaintiff in the action of ejectment. *Catlin* v. *Washburn*, 3 Verm. Rep. 26.

The plaintiff will not be prejudiced by having executed to a third person a mortgage deed of the premises since the commencement of the action, though such deed is in terms an absolute conveyance. *Gibson* v. *Seymour*, 3 Verm. Rep. 565.

Ejectment may be maintained on a mortgage, though the statute of limitations has run on the debt. *Reed* v. *Shipley*, 6 Verm. Rep. 602.

In ejectment upon a mortgage deed, the consideration upon which it was given is not examinable. *Doe* v. *Roll*, 7 Ham. Cases, 71, 2d part.

Where A. mortgaged lands to B., and afterwards leased the premises to C., who entered under A.; B. brings an action against A. for the lands; it is sustainable. *The Middletown Savings Bank* v. *Bates*, 11 Conn. Rep. 519.

In an action of ejectment brought upon a mortgage, the court will not allow the money due upon the mortgage to be paid into court, if there is a bill in equity pending on the mortgage. *Den ex dem. Smith* v. *Fen et al.*, 4 Halstead's Rep. 335.

Ejectment will not lie by a mortgagor against a mortgagee in possession, even after the money has been tendered. *Hill* v. *Payson et al.*, 3 Mass. Term. Rep. 559; *Beall* v. *Harwood*, 2 Har. & John. 167.

If the party in possession is not the mortgagor himself, *but [*61] a person claiming under a tenancy created by the mortgagor prior to the mortgage, the mortgagee will be bound by it;(*a*) but if the tenancy be created subsequently to the mortgage, without the privity of the mortgagee, it will be no defence to an ejectment brought by the mortgagee; because the mortgagor has no power to let leases not subject to every circumstance of the mortgage.(*b*) It seems also, that if the mortgagee demand from the mortgagor's tenant the interest due, and receive it from him in lieu of payment of rent, it will be such an admission of the lawfulness of the tenant's possession, as will preclude him from maintaining ejectment on a demise anterior to such payment, although it will not amount to an acknowledgment of a tenancy between himself and the party; but that payment of interest subsequent to the day of the demise by the mortgagor himself will not operate so as to legalize his tenant's possession up to that period as against the mortgagee.(*c*) Where also the mortgagor grants a lease for years subsequent to the mortgage, and the mortgagee does some act amounting to a consent that the lessee shall become his tenant, he does

(*a*) *Doe d. Da Costa* v. *Wharton*, 3 T. R. 2; *Thunder d. Weaver* v. *Belcher*, 3 East, 449.

(*b*) *Keech d. Warren* v. *Hall*, Doug. 21.

(*c*) *Doe d. Whitaker* v. *Holls*, 7 Bing. 322; *Doe d. Rodgers* v. *Cadwallader*, 2 B. & Ad. 473; *Evans* v. *Elliot*, 9 Ad. & El. 342, *et vide*, *Rogers* v. *Humphrey*, 4 Ad. & Ell. 299; *Doe d. Higginbottom* v. *Barton*, 3 Per. & Dav. 194.

One setting up and claiming under a mortgage admit's the mortgagor's title at the execution of the mortgage; and proving the mortgage to be usurious, shows that such title was not affected by it. *Jackson ex dem. Hills* v. *Tuttle*, 9 Cow. Rep. 233.

The heirs of a mortgagee, or, in case of their non-residence, the executor or administrator of the mortgagee, may sustain ejectment for the mortgaged premises against the mortgagor, or his tenant claiming under a lease granted after the mortgage, without the privity of the mortgagee; and the suit, in such case, may be brought without a demand of possession. *Brown* v. *Mace*, 7 Blackf. Rep. 2.

But the revised statutes of New York, part 3, chap. 5, tit. 1, sec. 57, (vol. 2, p. 312,) contain the following enactment:

"Sec. 57. No action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises."

In ejectment brought by a mortgagee against a tenant claiming under the mortgagor, by a quit claim deed, the mortgagor is not admissible for the plaintiff. Having conveyed by a quit claim only, he cannot be made responsible to his grantee in any event; but if the plaintiff should fail to recover the premises, he will be liable to him on the mortgage bond for the whole amount for which the premises were mortgaged; should the plaintiff recover, he would be relieved, wholly or partially, from payment. *Jackson ex dem. Roundes* v. *M'Chesney*, 7 Cow. Rep. 360.

not thereby set up the lease, but only creates a tenancy from year to year.(*a*)

If the words of the conveyance creating the mortgage operate as a redemise of the premises to the mortgagor until default, it seems that the mortgagor is entitled to notice or demand of possession after default, before ejectment can be maintained against him, but, that if the words do not so operate, he will not be so entitled, although the conveyance expressly stipulates that it shall be lawful, upon default, for the mortgagee to enter into possession "after giving one month's notice."(*b*) Where also the words do not operate as a redemise, the mortgagee is *entitled to possession before default, notwithstanding a proviso, that it shall be lawful for him to enter upon and enjoy the premises after default.(*c*)

If the mortgagee assign the mortgage, and the assignee assign to another, the last assignee may maintain ejectment for the mortgaged premises.(*d*)

If there be two several mortgages of the same lands, the mortgagee who has the legal estate will be entitled to recover in an ejectment against the other mortgagee, although his mortgage be posterior in point of time.(*e*)

3. Lord of a Manor.

When the tenant of copyhold premises has committed an act by which he forfeits his lands, he who is lord at the time of the forfeiture committed, may maintain an ejectment for the recovery of them; but this right is confined to the lord for the time being, unless the act of
[*62] forfeiture destroy the estate, and *then the heir of the lord, in whose time it was committed, may also take advantage of it.(*g*)

Where, however, a copyholder, holding of a manor, belonging to a

(*a*) *Doe d. Hughes* v. *Bucknell*, 8 Car. & P. 566.
(*b*) *Wheeler* v. *Montifiore*, 2 Q. B. R. 133; *Doe d. Lyster* v. *Goldwin*, Ibid. 143; *Doe d. Parsley* v. *Day*, Ibid. 147, and the authorities there cited.
(*c*) *Doe d. Roylance* v. *Lightfoot*, 8 M. & W. 553.
(*d*) *Smartle* v. *Williams*, Salk. 245.
(*e*) *Goodtitle d. Norris* v. *Morgan*, 1 T. R. 755.
(*g*) Wat. Copy, vol. 1, 224 to 353; *Doe d. Tarrant* v. *Hellier*, 3 T. R. 162.

bishopric, committed a forfeiture, by felling timber during the vacancy of the see, the succeeding bishop was allowed to maintain an ejectment against him.(*a*)

The right of the lord to maintain ejectment against his copyholder, for a forfeiture by committing waste, will not be taken away by an intermediate estate in remainder, between *the life estate of the copyholder and the lord's reversion; for if it were, the tenant for life, and remainderman, by combining together, might strip the inheritance of all the timber.(*b*)

When an inclosure has been made from the waste for twelve or thirteen years, and seen by the steward of the same lord from time to time without objection made, it may be presumed by the jury to have been made by the license of the lord, and, upon such presumption, an ejectment cannot be maintained by him against the tenant, without a previous notice to throw it up.(*c*)

It has never been expressly decided, whether the Statute of Limitations will run against the lord, in case of a forfeiture by a copyholder, and bar his taking advantage of it after a lapse of twenty years; *but from the language of Lord Kenyon, C. J., in the case of [*63] *Doe d. Tarrant* v. *Hellier*, it seems that its provisions would be applicable to this as well as to all other rights of entry.(*d*)

An assignment of copyhold premises by a common law conveyance of lease and release, without surrender to the lord of the manor, is not sufficient to support an ejectment by the release, even against the widow of the releasor.(*e*)

4. Copyholder.

Whilst the ancient practice of the action of ejectment prevailed, it seems to have been holden, that a copyholder could not maintain an ejectment, upon a demise for a longer term than a year, unless the license of the lord were first obtained, †or a special custom existed in

(*a*) B. N. P. 107.
(*b*) *Doe d. Folkes* v. *Clements*, 2 Maul. & Sel. 68.
(*c*) *Doe d. Foley* v. *Wilson*, 11 East, 56.
(*d*) 3 T. R. 162, 172.
(*e*) *Doe d. North* v. *Webber*, 3 Bing. N. C. 922.

the manor enabling him to make longer leases: and, in some authorities, it is even doubted, whether an ejectment can in any case be supported by a copyholder.(*a*) But since the introduction of the modern practice, these objections are wholly obviated, and the common consent rule is now sufficient to enable a copyholder to maintain ejectment.

A copyholder who claims by descent as *heir*, may maintain ejectment without admittance, as his title is complete against all the world, except the lord, immediately upon the death of the ancestor;(*b*) but if it be necessary for him to proceed against the lord for a seizure on the death of the ancestor, he must prove that he has tendered himself to
[*64] *be admitted at the lord's court, or that the lord has done some act dispensing with such tender.(*c*)

When, also, the lord grants a reversion of a copyhold expectant on a life estate, as the grantee acquires a perfect title by the grant only, he may on the termination of the life estate maintain ejectment without admittance.(*d*)

But, in all cases where the copyholder claims as *surrenderee*,(*e*) as the surrender and admittance make but one *conveyance,(*g*) the legal title does not vest in the surrenderee, and, of course, he cannot maintain ejectment, until after admittance; but when admitted, the title relates back to the time of the surrender, against all persons but the lord; and,

(*a*) *Stephen's* v. *Elliot*, Cro. Eliz. 483; *Goodwin* v. *Longhurst*, Cro. Eliz. 535; *Spark's case*, Cro. Eliz. 676; *Downingham's case*, Owen, 17; *Eastcourt* v. *Weeks*, 1 Lut. 799, 803.

(*b*) *Rex* v. *Rennett*, 2 T. R. 197; *Doe d. Hinton* v. *Rolfe*, Nev. & Per. 648; *Doe d. Taylor* v. *Crisp*, 6 Ad. & El. 779.

(*c*) *Doe d. Burrell* v. *Bellamy*, 2 M. & S. 87.

(*d*) *Roe d. Cash* v. *Loveless*, 2 B. & S. 87.

(*e*) In the case of *Doe d. Warry* v. *Miller*, (1 T. R. 393.) it was endeavored to assimilate to copyhold principles, the practice of the Society of New Inn, in granting out their chambers for lives. It is customary with that Society, in such grants, to insert a clause, that the tenant shall not sell or assign, without the license of the Society, and for the grantees, when they wish to transfer their interest, to surrender the chambers, (upon a proper deed stamp,) to the Treasurer and Ancients, to the intent that they shall grant the said chambers to the transferree; which subsequent grant is never in point of fact made, but simply an entry of admittance inserted in the Society's books. It is, therefore, evident, that after the first surrender, the legal estate always remains in the Treasurer and Ancients, as trustees for the subsequent transferrees respectively, and that the terms *surrender* and *admittance* bear not the slightest resemblance in their meaning, to the surrender, and admittance to copyhold premises.

(*g*) *Roe d. Jeffereys* v. *Hicks*, 2 Wils. 13, 15.

therefore, a surrenderee may recover in ejectment against his surrenderor, or a stranger, *upon a demise laid between the [*65] times of admittance and surrender, provided, the admittance be made before the day of the trial.(*a*)

Where the devisee of a customary estate, which had been surrendered to the use of the will, died before admittance, it was holden that her devisee, though afterwards admitted, could not recover in ejectment; for the admittance of the second devisee had no relation to the last legal surrender, and the legal title remained in the heir of the last surrenderor.(*b*)

5. Lessee of a Copyholder.[1]

The privilege of the lessee of a copyholder to maintain ejectment, seems, according to the old authorities, to have been formerly limited to those cases in which his lease was for one *year only, or in which, (being of longer duration,) the license of the lord had been previously obtained, or there was a special custom in the manor authorizing such leases,(*c*) but it is now settled that a lessee for years, being a copyholder, may maintain ejectment, although he have not the license of the lord, and no special custom exists in the manor authorizing such leases, for the lease gives him a good title against every one but the lord.(*d*)

6. Widow for her Free-Bench.

(*a*) *Holdfast d. Woolhams* v. *Clapham*, 1 T. R. 600. *Doe d. Bennington* v. *Hall*, 16 East, 208; Ashurst, J., in delivering the judgment of the Court in *Holdfast d. Woolhams* v. *Clapham*, was of opinion that the surrenderee might maintain ejectment against his surrenderor, although not admitted before the trial, because the surrenderor is but *a trustee to his surrenderee;* but it should seem, since the legal estate remains in the surrenderor until the time of admittance, that this doctrine is not applicable to the present principle of the action. Vide *Doe d. Da Costa* v. *Wharton*, 8 T. R. 2; B. N. P. 109.

(*b*) *Doe d. Vernon* v. *Vernon*, 7 East, 8.

(*c*) Co. Copy. s. 5; *Goodwin* v. *Longhurst*, Cro. Eliz. 535.

(*d*) *Doe d. Tressider* v. *Tressider*, 1 Q. B. R. 416.

[1] Copyhold lands were granted to A. for the lives of herself and B., and in reversion to C. for other lives. A. died, having devised to B., who entered and kept possession for more than twenty years. On his death, C. brought ejectment; held, that the action was barred by the statute of limitations, for that C.'s right of possession accrued on the death of A., inasmuch as there cannot be a general occupant of copyhold land. *Doe ex dem. Foster et al.* v. *Scott*, 4 Barn. & Cress. Rep. 706.

[*66] *When there is a custom in a manor, that the widow shall enjoy, during her widowhood, the whole, or part of the customary lands, wherewith her husband died seised, as of free-bench, she may, after challenging her right, and praying to be admitted,(*a*) maintain an ejectment for them, without admittance, even against the lord; because, it is an excrescence which, by the custom and the law, grows out of the estate.(*b*)

But, if the widow's claim be in the nature of dower,[1] an ejectment

(*a*) Co. Copy. s. 5; *Goodwin* v. *Longhurst*, Cro. Eliz. 535.
(*b*) *Doe d. Burrell* v. *Bellamy*, 3 M. & S. 87.

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[1] In ejectment for dower, admeasured on application to the surrogate, under the act, (1 R. L. 60, 1, 2,) the proceedings are no evidence of title, nor of anything more than the part assigned belongs to the widow, after a title is shown. "This is like any other ejectment suit. The plaintiff must make out his title; and the defendant is at liberty to impeach it." *Jackson ex dem. Clarke* v. *Randall*, 5 Cow. Rep. 168, 170; *Jackson ex dem. Sitzer* v. *Waltermire*, ibid. 289; *Matter of Watkins, widow*, 9 Johns. Rep. 245; *et vide Matter of Gardiner* v. *Spikeman*, 10 Johns. Rep. 368.

"Until the admeasurement is reversed, it must be conclusive, in an action of ejectment, as to the part belonging to the widow. *Jackson ex dem. Miller* v. *Hixon*, 17 Johns. Rep. 123, 127.

The same evidence of seisin which would entitle the heir to recover in ejectment, will maintain an action for dower. *Jackson ex dem. Sitzer* v. *Waltermire*, 5 Cow. Rep. 299.

The proceedings to set off or assign dower by the court of common pleas, under the act, (1 R. L. 60,) are merely evidence of the location of the land to be recovered. All the other facts, as seisin of the husband, &c., must be proved in the ordinary way, as in an action of dower. Ibid.

Actual possession of the husband, or the receipt by him, is, *prima facie*, evidence of seisin, in an action for dower. Ibid.

Where it appeared by parol, that the husband bought a farm, paying something towards it, taking possession and selling to another, who succeeded him in the possession; and so through several tenants down to the defendant, who was in possession; held, that this was, *prima facie*, evidence of the husband's seisin; and sufficient to entitle his widow to recover dower, though no deeds were shown. Ibid.

But by the Revised Statutes of New York, ejectment will lie for dower before assignment or admeasurement. *Vide* part 3, chap. 5, tit. 1, §§ 1, 10, 55 and 56. (Vol. 2, pp. 303, 304, 311 and 312.) The manner in which dower is to be assigned, after ejectment brought, is prescribed in the following sections: (Vol. 2, pp. 311, 312.)

"Sec. 55. If the action be brought to recover the dower of any widow, which shall not have been admeasured to her before the commencement of such action, instead of a writ of possession being issued, such plaintiff shall proceed to have her dower assigned to her in manner following:

"1. Upon the filing of the record of judgment, the court, upon the motion of the plaintiff, shall appoint three reputable and disinterested freeholders, commissioners, for the purpose of making admeasurement of the dower of the plaintiff, out of the lands described in the

will not lie before assignment,(*a*) but she must levy a plaint in the nature of a writ of dower, in the lord's court.(*b*)

(*a*) *Jurdan* v. *Stone*, Hutt. 18; *Howard* v. *Bartlett*, Hob. 181; *Doe d. Nutt* v. *Nutt*, 2 C. & P. 430.

(*b*) *Chapman* v. *Sharpe*, 2 Show. 184.

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record; and the commissioners so appointed, shall proceed in like manner, possess the like powers, and be subject to the like obligations and control, as commissioners appointed pursuant to the seventh title of the eighth chapter of this act:

"2. The report of the commissioners may be appealed from by any party to the action, within the same time, and the like proceedings shall be had thereupon, as are prescribed in the said seventh title of the said eighth chapter:

"3. Upon the confirmation of the report of the commissioners, a writ of possession shall be issued to the sheriff of the proper county, describing the premises assigned for the dower, and commanding the sheriff to put the defendant in possession thereof.

"Sec. 56. The costs and expenses incurred in such admeasurement of dower, shall be subject to the provisions contained in the seventh title of the eighth chapter of this act."

The provisions of the Revised Statutes substituting the action in ejectment to recover in lieu of the writ of dower affect only the forms of proceeding, and do not alter the right or interests of the widow in the land. *Yates* v. *Paddock*, 10 Wen. 528.

She has a mere right of action, and is not a tenant in common, and consequently is not bound to prove an actual ouster, or any other act amounting to a denial of her right. Ib.

The alienation of the land during the lifetime of the husband, and its value at the time of such alienation, it seems, cannot be given in evidence on the trial, but must be shown to the commissioners appointed to make admeasurement. Ib.

A widow is not a tenant in common with the tenant of the land in which dower is claimed. *Oothout* v. *Ledings*, 15 Wen. 410.

A wife, divorced from bed and board, who is decreed the use of a house and lot for alimony, may recover the possession in ejectment. *Leverus' Lessee* v. *Murdock*, Wright's Ohio Rep. 205.

In ejectment for dower, proof that the plaintiff's husband was in possession during coverture claiming title, is, *prima facie*, sufficient evidence of seisin to warrant a recovery against one whose possession commenced after that of the husband. *Carpenter* v. *Weeks*, 2 Hill's N. Y. Rep. 341. See *Jewell* v. *Harrington*, 19 Wend. Rep. 471; *Bowne* v. *Potter*, 17 Wend. 164.

Ejectment for dower, as in other cases, must be against the actual occupant, and if there be none, then against the person exercising acts of ownership or claiming to be entitled in the premises. *Sherwood* v. *Vandenburgh*, 2 Hill, 303.

Though a widow is entitled to dower in an equity of redemption, she cannot maintain ejectment for it against the mortgagee or his assigns in possession, if the mortgage be forfeited, but she must resort to a court of equity. *Cooper & Wife* v. *Whitney*, 3 Hill, 95.

In ejectment for dower, the plaintiff cannot, in general, for the purpose of showing her right to recover, avail herself of recitals contained in the deed by which defendant holds the premises, or contained in the deed of his grantor, recognizing her right of dower, not being a party or privy to those deeds herself, they cannot operate as an estoppel upon her, and consequently cannot have that effect upon others. But in case of the loss of the primary evidence to establish the right to recover, such recitals may be resorted to as secondary evidence. *Irwell* v. *Harrington*, 19 Wen. 471.

7. Guardian in Socage,(*a*) or Testamentary Guardian, appointed pursuant to the statute, 12 Car. II. c. 24, s. 8.(*b*)

But, a guardian for nurture cannot maintain ejectment, for *he cannot make leases for years, either in his own name, or in the name of the infant; because, he has only the care of the person, and education of the infant, and has nothing to do with the lands merely in virtue of his office.(*c*)[1]

(*a*) Litt. sec. 123, 124; *Wade* v. *Cole*, Ld. Raym. 130.
(*b*) *Bedell* v. *Constable*, Vaugh. 177; *Doe d. Parry* v. *Hodgson*, 2 Wils. 129.
(*c*) *Ratcliff's case*, 3 Co. 37.

W., a soldier in the New York line, died in 1778, leaving his only heir at law, an elder brother I., who, in 1783, married the plaintiff. In 1786 I. gave a quit-claim deed to P. of all lands which might thereafter be granted by the state to M. as a gratuity for his military services. Subsequently a patent was issued to M. of certain lands which included the premises. I. died, and the plaintiff, his widow, brought ejectment for dower against one in possession under title derived from P. Held, that defendant was estopped from denying seisin of plaintiff's husband, and, therefore, she was entitled to recover. *Sherwood* v. *Vandenburgh*, 2 Hill, 303.

In ejectment for dower, proof that the plaintiff's husband was in possession during coverture, claiming title, is *prima facie* sufficient evidence of seisin to warrant a recovery against one whose possession commenced after that of the husband. *Carpenter* v. *Weeks*, 2 Hill, 341.

In ejectment for dower, the husband, a few days before marriage, conveyed the lands to children of a former marriage, as an advancement, and with the intention of preventing the plaintiff from acquiring a right of dower, and without her knowledge. Held, that the conveyance was valid, and that the action could not be maintained. *Baker* v. *Chase*, 6 Hill, 482.

The possession of tenant being that of landlord, in ejectment against the former, the latter is in general incompetent as a witness for him; and when in an ejectment for dower the defendant offered B., his landlord, as a witness, and it appeared that B. had leased to the defendant for years, with a covenant for quiet enjoyment, and that B.'s title was a lease in fee from V., containing a like covenant, and reserving rent and a quarter sale, it was held, that B. was incompetent, notwithstanding V.'s covenant to him; his interest preponderating in favor of his tenant. *Moak* v. *Johnson*, 1 Hill, 99.

In ejectment, the declaration contained three counts for the same premises, in one the plaintiff claimed an estate in dower as widow; and in the others an estate in fee, as heir at law; to all of which the defendant pleaded one plea of not guilty; and the plaintiff had a verdict on the count claiming dower, and the defendant on the other counts: Held, that the plea might be regarded as making a several issue on each count so as to entitle the defendant to costs on the matters found in his favor. But it does not seem to be settled whether this rule would prevail where the plaintiff sets up the same title under several counts claiming different degrees of interest in the land, and the defendant succeeds as to some of them, or where there are counts upon the title of several plaintiffs, some of whom succeed and others fail. *Crittenden* v. *Crittenden*, 1 Hill, 359.

[1] See *Teft* v. *McGill*, 3 Barr. 256 See *Holmes* v. *Seely*, 17 Wendell's Rep. 75.

*8. INFANT. [*67]

It is difficult to discover any principle upon which both infant and guardian can have the right of maintaining ejectment for the same lands, but it seems, notwithstanding, that they do possess such right. In the case of *Doe d. Holsworth* v. *Handcock*, *coram* Park, J., tried at the Derby Summer Assizes, 1836, the lessor of the plaintiff was an infant, aged nineteen years, and the tenancy was proved to have been made with the plaintiff as testamentary guardian, and the learned judge ruled that the demise was properly laid, and refused to reserve the point.

9. ASSIGNEE OF A BANKRUPT,[1] OR INSOLVENT DEBTOR.

By the operation of the present Bankrupt Acts, all the real and personal property of the bankrupt, both present and future, vests in the official assignee by the mere effect of the commissioner's appointment; and when the trade assignees are chosen, and their appointments signed by the commissioners, the property then vests in them and the official assignees jointly.(*a*)

*The only exceptions are estates tail and copyhold, which [*68] must be duly assigned by the commissioners.(*b*)

(*a*) 1 & 2 Wm. IV. c. 56, s. 25, 26; 5 & 6 Vict. c. 122, s. 48.
(*b*) 3 & 4 Wm. IV. c. 74, s. 55, 73; 6 Geo. IV. c. 16, s. 68, 69.

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[1] The provisional assignee of the insolvent debtors' court may maintain ejectment for the property of an insolvent, under the provisions of the 1st Geo. 4, c. 119, and the 3rd Geo. 4, c. 123. *Den ex dem. Clark et al.* v. *Spencer*, 2 Car. & P. Rep. 79.

A., who claims to hold lands under B., as a security for a debt, cannot defend an ejectment against the assignees of B., after his bankruptcy, on the ground that the grant under which B. derives his title from the crown is void. *Doe ex dem Biddle* v. *Abrahams*, 1 Starkie's Rep. 305.

Although the assignment of an insolvent debtor passes the legal estate in his lands, yet a trust results by operation of law, which, as soon as the debts are satisfied, entitles him to the possession against his assignees, *et a multo fortiori*, against a stranger, against whom he may maintain an ejectment in his own name; and, in the absence of proof to the contrary, this Court will intend that he produced satisfactory evidence that the debts were paid; particularly after a a lapse of fourteen years. *Ross* v. *M'Junkin*, 12 Serg. & R. Rep. 364.

It is not necessary to produce the original order for the discharge of an insolvent debtor in order to prove the title of his assignee, to maintain ejectment, as such, under the 1 Geo. 4, c. 119, s. 4. *Doe ex dem. Ibbetson et al.* v. *Land*, 3 Dowl. & Ryl. Rep. 509.

The assignees of a bankrupt, under the bankrupt act of the United States, of 1800, may maintain ejectment. *Barston* v. *Adams*, 2 Day, 70.

Where a tenant in fee simple of customary land, which passed by bargain and sale with surrender and admittance, became bankrupt, and the commissioners assigned the land to the *assignees, and] the bankrupt died, and after his death the assignees were admitted, upon ejectment brought on the several demises of the heir of the bankrupt and of the assignees, both being before the day of the admittance, the Court held, that the title was not in abeyance from the time of the assignment to the time of the admittance, but did not decide whether it passed by the assignment to the assignees, or remained in the heir until admittance.(*a*)

When a trader, being seised of an estate for life, with a general power of appointment, with the remainder in default to himself in fee, executed his appointment after an act of bankruptcy, and was then declared bankrupt, and duly assigned the premises to his assignee: it was held that the appointment was void, and that the legal title passed to the asignee.(*b*)

A difference prevails between cases of bankruptcy and insolvency, where the party is possessed of a term of years. In the former case, the term does not pass by the assignment of the commissioners to the assignees, unless they elect to accept it; and if they decline to accept, the term will remain in the bankrupt, as though no commission [*69] had issued, unless he deliver up the lease within fourteen *days to the lessor, and he may maintain ejectment, if ousted, notwithstanding his bankruptcy. But in the case of an insolvent debtor, the term vests absolutely in the provisional assignee by the assignment to him; and if the assignee subsequently appointed should elect not to accept the term, it will not revert to the insolvent, but the lessor must make his application to the Insolvent Court, who have power to make such order therein as they shall deem just.(*c*)

†10. Conusee of a statute-merchant or staple.(*d*)

(*a*) *Doe d. Danson* v. *Parke*, 4 Ad. & El. 816.

(*b*) *Doe d. Coleman* v. *Britain*, 2 B. & A. 93; *vide* 6 Geo. IV. c. 16, s. 81.

(*c*) 6 Geo. IV. c. 16, s. 75; 7 Geo. IV. c. 57, s. 23; 1 Wm. IV. *Doe d. Palmer* v. *Andrews*, 4 Bing. 348; *Doe d. Clarke* v. *Spencer*, 3 Bing. 203, 370; *Copeland* v. *Stephens*, 1 B. & A. 593; *Crofts* v. *Pick*, 8 Moore, 384; S. C., Bing. 154; *Lindsay* v. *Limbert*, 2 C. & P. 526.

(*d*) Co. Litt. 42(*a*); *Hammond* v. *Wood*, Salk. 563.

11. Tenant by elegit.[1]

[1] By the common law, a man could only have satisfaction of goods, chattels, and the present profits of lands, by the writs of *fieri facias* or *levari facias;* but not the possession of the lands themselves. The statute therefore granted the writ of *elegit*, (called an *elegit*, because it is in the choice or election of the plaintiff whether he will sue out this writ or one of the former,) by which the defendant's goods and chattles are not sold, but only appraised; and all of them, (except oxen and beasts of the plough,) are delivered to the plaintiff at such reasonable appraisement and price in part satisfaction of his debt. If the goods are not sufficient, then the moiety or one half of his freehold lands which he had at the time of the judgment given, whether held in his own name, or by another in trust for him, are also to be delivered to the plaintiff, to hold until, out of the rents and profits thereof, the debt be levied, or until the defendant's interest be expired. During this period, *the plaintiff is called tenant by elegit.* 3 Blk. Com. pp. 418, 419.

The *fi. fa.* is now the uniform process to sell lands, and the *elegit* is abandoned. Note to 4 Kent's Com. 436.

In order to make out a title to lands by the levy of an execution, it must be shown that the appraisers were indifferent freeholders, and that they were sworn according to law. *Tweedy et al.* v. *Pickett*, 1 Day's Cases, 109.

To recover in ejectment under a purchase at a sheriff's sale, on a judgment against a party not in possession, the plaintiff must prove against the one found in possession, that the party against whom the judgment was rendered, had some right, title, or interest in the premises sold. And it was held not enough to show that such party held adversely for less than twenty years, but abandoned the premises before judgment, to which she never returned: though a few months after abandoning, she conveyed to the defendant in the ejectment, who afterwards entered under the conveyance. *Jackson ex dem. Stewart* v. *Town*, 4 Cow. Rep. 599.

An equitable or legal seisin must be shown, on which a judgment can attach, and be a lien, in order to warrant a sale of real estate under it. Ibid.

Where the party against whom the judgment is recovered, is the actual possessor, this is sufficient of itself; for actual possession is *prima facie* evidence of title; and he cannot show title in another. Ibid.

If one convey, before judgment against him, the land conveyed cannot be sold under the judgment; and the law will intend such conveyance to be *bona fide*, and for valuable consideration until the contrary is shown. Ibid.

In making out a title under a sheriff's deed, it appeared that the debtor in the execution was in the possession several years before it issued, and before the judgment; and that the defendant in ejectment held under him as tenant. Held, that the defendant was estopped to show title out of the debtor. *Jackson ex dem. Witherell et al.* v. *Jones*, 9 Cow. Rep. 182.

Where the plaintiff in ejectment made title under a purchase upon execution, against the tenant of the judgment debtor, (the tenant being defendant in ejectment,) and showed by parol that the defendant confessed he held under the debtor by lease; and the defendant gave evidence that it was a written lease, and then objected that the plaintiff should produce the lease, or show notice to produce it; held, that the production of the lease lay with the defendant; and he omitting to produce it, or give legal proof of it, the lease should be taken to have expired or not to be a subsisting lease, so as to prevent the plaintiff's recovery. Ibid.

It is laid down in the case of *Lowthl* v. *Tomkins*,(*a*) that if a tenant by *elegit* desire to obtain *actual* possession of the lands he must bring an ejectment, for the sheriff, under the writ, delivers only the *legal* possession; which doctrine is recognized by Lord Kenyon, C. J., in the case of *Taylor* v. *Cole*;(*b*) but in the case of *Rodgers* v. *Pitcher*,(*c*) it is said by Gibbs, C. J., "I am aware that it has in several places been said, that the tenant in *elegit* cannot obtain possession without an ejectment, but I have always been of a different opinion. There is no case [*70] in which a party may maintain ejectment in which he *cannot enter. The ejectment supposes that he has entered; and that the lessor may do it by another, and not enter himself, is not very intelligible. I would not, however, consider the present case as now deciding these points, which I only throw out in answer to the argument that has been used."

When a tenant in possession claimed under a lease granted prior to the date of the judgment against his lessor, it was held that the tenant by *elegit* could not recover in ejectment; because the lessee's title being prior in point of time, the legal estate was in him;(*d*) but where the possession of the tenant was subsequent to the date of the judgment, although prior by two years to the issuing of the writ of *elegit* and inquisition thereon, the title of the tenant by *elegit* was not barred.(*e*) If, however, the tenant does not himself claim this protection, but suffers judgment by default, it will not avail the *judgment debtor, though he may appear as landlord and defend the action.(*g*)

12. Personal representative.(*h*)

This right is of course confined to those lands which the testator, or intestate, held for a term of years; but it is immaterial whether the ouster be after, or before the death of the testator, or intestate.(*i*)

[*71] *Personal representatives may recover in ejectment under the statute 29 Car. II. c. 3, s. 12, appropriating estates held *pur autre vie* where there is no special occupant. But this statute

(*a*) 2 Eq. Ca. Ab. 380.
(*b*) 3 T. R. 295.
(*c*) 6 Taunt. 202.
(*d*) *Doe d. Da Costa* v. *Wharton*, 8 T. R. 2.
(*e*) *Doe d. Putland* v. *Hilder*, 2 B. & A. 782.
(*g*) *Doe d. Cheese* v. *Creed*, 2 M. & P. 648.
(*h*) 4 Edw. III. c. 7.
(*i*) *Slade's case*, 4 Co. 92, 95.(*a*); *Doe d. Shore* v. *Porter*, 3 T. R. 13.

does not extend to the copyholds, and, therefore, one who was admitted tenant upon a claim as administrator *de bonis non* to the grantee of a copyhold *pur aurte vie*, was not permitted to maintain ejectment.(*a*)

13. Devisee.[1]

Where the devise is of a freehold interest, the devisee may immediately, and without any possession, maintain ejectment for the lands devised;(*b*) but if it be a legacy of a term of years, he must first obtain the assent of the executors to the bequest.(*c*) When, however, such assent is obtained, the legal estate vests absolutely in the legatee, and he may maintain ejectment against the executor, as well as against a stranger.(*d*)

(*a*) *Zouch d. Forse* v. *Forse*, 7 East, 186.
(*b*) Co. Litt. 240,(*b*)
(*c*) *Young* v. *Holmes*, Stran. 70.
(*d*) *Doe d. Lord Say and Sele* v. *Guy*, 3 East, 120.

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[1] The devisee of land may maintain ejectment therefor, when it is obvious that no action of the probate court, in ordering a division, or assigning the land, can become necessary, and there is no pretence that the executor has any lien upon the land, or so long time have elapsed that his lien will be presumed satisfied. *Abbott* v. *Pratt*, 16 Verm. Rep. 626.

In Massachusetts, it has been decided, that the devisee of vacant land has, by operation of law without an entry, such seisin as will enable him to maintain a writ of entry. *Green* v. *Chelsea*, 23 Pick. Rep. 71.

It is not necessary that an executor of a will, made in Virginia, devising to him land in Kentucky, should take out letters testamentary in Kentucky, to enable him to maintain ejectment for such land. *Doe ex dem. Lewis et ux.* v. *M'Farland et al.*, 9 Cranch's Rep. 151.

Devise of real estate to four persons, named in the will as executors, to rent the same and distribute the profits among the testator's wife and children. Afterwards, three of the executors refused the trust; one of them died; the other two renounced, by an instrument in writing, after the commencement of the suit; but were examined as witnesses and declared they had, from first, refused the trust. Held, that the other executor alone might recover in ejectment. *Jones* v. *Maffett et ux.*, 2 Serg. & R. Rep. 523.

Where the devisee of an estate refused to take it, saying she was entitled as heir at law, and would not accept any benefit by the will of the devisor: held, that this was not such a disclaimer as prevented her form afterwards bringing ejectment and relying on her title as devisee.

Quære, whether a devise of an estate can be waived by parol? *Doe dem. Smyth* v. *Smyth*, 6 Barn. & Cress. Rep. 112.

A devise in fee may, by deed, without matter of record, disclaim the estate devised. *Townson* v. *Tickell et al.*, 3 Barn. & Ald. Rep. 31.

An executor may maintain ejectment for lands held by his testator for a term of years. *Duchane* v. *Goodtitle*, 1 Blackf. Rep. 117.

14. GRANTEE OF A RENT-CHARGE, having power to enter *upon the lands, if the rent be in arrear, and hold them until satisfaction.(*a*)[1]

These rights of entry are always taken strictly: and where a man gave a leasehold estate by will to B., his executors, &c., subject to a rent-charge to his wife during her widowhood, with a power to [*72] the **widow* to enter for non-payment of rent, and to enjoy, &c., until the arrears were satisfied, and in case of the widow's marriage, he willed that B. should pay the rent-charge to C., his executors, administrators, and assigns, it was holden that C.'s executors, after the widow's marriage, and C.'s subsequent death, had no right of entry for non-payment of the rent-charge.(*b*)

15. ASSIGNEE OF THE REVERSION,[2] upon a right of re-entry for condition broken.(*c*)

(*a*) *Jemott* v. *Cowley*, 1 Saund. 112.
(*b*) *Hassell d. Hodson* v. *Gowthwaite*, Willes, 500.
(*c*) 32 Hen. VIII. c. 34.

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[1] The payment of a lien, or a charge on land, may be enforced by ejectment. *Galbraith et al.* v. *Fenton*, 2 Serg. & R. Rep. 359.

Ejectment will lie under a mortgage on non-payment of money, though the act of Assembly gives a different mode of proceeding. *Lessee of Smith et al.* v. *Buchanan*, (cited,) 1 Yeates' Rep. 13.

See *Walcop* v. *M'Kinney*, 10 Mis. Rep. 229; *Brown* v. *Mace*, 7 Blackf. Rep. 2.

But, it seems, ejectment is not the proper form of an action to recover a legacy charged on land. *Gause* v. *Weley*, 4 Serg. & R. Rep. 509.

Before the grantee of a rent-charge can enter for the non-payment of rent, he must make a demand of the precise amount due on the day on which it became due, and on the most notorious part of the land; although the possession be vacant and there be nothing to distrain. *M'Cormick* v. *Connell*, 6 Serg. & R. Rep. 151.

Where one of two parties executed an assignment of a lease, absolute in its terms, and, at the same time, gave a separate writing to surrender the possession on a future day, and the assignee, at the same time, contracted in writing, with the assignor, to pay a sum of money on a day before the time of said stipulated surrender, it was held, that on the refusal of the assignor to surrender according to his contract, the assignee might maintain ejectment for the premises without having made such payment. *Strong* v. *Garfield*, 10 Vermont Rep. 497.

Where A. mortgaged lands to B., and A. afterwards leased the same lands to C., who entered under A; and, while C. was thus in possession as the tenant of A., paying him rent, B. brought ejectment against A. for such lands; it was held that the action was sustainable. *Middletown Savings Bank* v. *Bates*, 11 Conn. Rep. 519.

[2] An assignment of lands not under seal cannot invest an assignee with such a title as will enable him to maintain ejectment. *Ansley* v. *Nolan*, 6 Porter's Rep. 379.

By the common law, no one could take advantage of a condition or covenant but the immediate grantor, or his heirs; a principle consistent with the old feudal maxims, but highly injurious to the rights of grantors, when the practice of alienating estates became general, and leases for years a valuable possession. To remedy this evil, it is enacted by the 32 Hen. VIII. c. 34, that the grantees, or assignees of a reversion shall have the same rights and advantages, with respect to the forfeitures of estates, as the heirs of individuals, and the successors of corporations, had until that time solely enjoyed; and this statute is made most general in its operation, by particularly including the grants from the Monarch of those lands, which had then recently become the property of the Crown by the dissolution of the monasteries.

*The words of the statute grant the privilege of re-entry to [*73] the assignees "for non-payment of rent, or for doing waste, or *for other forfeiture;*" but these latter words have been limited in their interpretation to "*other forfeiture of the same nature,*" and extend to the breach of such conditions only, as are incident to the reversion, or for the benefit of the estate. Thus, the assignee may take advantage of conditions for keeping houses in repair, for making of fences, scouring of ditches, preserving of woods, &c., but not of collateral conditions, as for the payment of a sum in gross, or for the delivery of corn, or wood, or such like.(*a*)

In *Spencer's case*,(*b*) many differences are taken and agreed between collateral or personal covenants, and covenants which run with the land or are incident to the reversion; and much learning is displayed, which it would be foreign to the purpose of this Treatise to discuss; but it may be useful to present a concise view of the decided cases.[1]

(*a*) Co. Litt. 215,(*b*.)
(*b*) 5 Coke, 16.

[1] A covenant in a deed of land not to erect a building on a common or public square, owned by the grantor in front of the premises conveyed, is a covenant running with the land, and passes to a subsequent grantee of the premises, without any special assignment of the covenant. *Trustees of Watertown* v. *Cowen*, 4 Paige, 510.

Where a covenant running with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to separate individuals, the covenant will attach on each parcel *pro tanto*. And the assignee of each part will be answerable for his proportion of any charge upon the land, which was a common burden upon the whole, and will be exclusively liable for the breach of any covenant which related to that part alone. *Astor* v. *Miller*, 2 Paige, 68; 1 Am. Ch. Dig., p. 440.

A. covenanted for himself, his executors and administrators, that he would build a wall upon part of the land demised; the assignee was not bound by this covenant, because the wall was not *in esse* at the time of the demise made, but to be newly built after; but it was resolved, that if the lessee had covenanted for himself *and his assigns* expressly, it would have bound the assignee, although the wall was not *in esse*, inasmuch as what was covenanted to be done, was to [*74] be done on the land demised;(*a*) but if the *matter covenanted to be done does in no manner touch or concern the thing demised, as to build a wall on other land, or pay a collateral sum to the lessor, the assignee, though named, will not be bound.(*b*)

*A covenant in a lease of land, that the lessee or his assigns will not hire persons to work on the demised premises who are settled in other parishes, is a collateral covenant, and does not bind the assignee, although expressly named; for it does in no way affect the thing demised, although it may collaterally affect the lessor by increasing the poor rates upon him.(*c*)

A covenant to supply the demised premises with good water during the term runs with the land, for it is a covenant which respects the premises demised, and the manner of enjoyment.(*d*)

A covenant to insure against fire, premises situated within the weekly bills of mortality mentioned in 14 Geo. III. c. 78, is a covenant that runs with the land; because, by the operation of the 83rd section (which enables the landlord, by application to the directors of the insurance office, to have the sum insured laid out in rebuilding the premises) this is in effect a covenant to lay out a given sum of money in rebuilding or repairing premises in case of damage by fire, which clearly is a covenant running with the land. Best, J., was of opinion, that if the premises had not been within the limits of the act, it would not have varied the case, *because the original covenantee could not avail himself of the covenant*, inasmuch as, after the assignment, he sustains no loss by the destruction of the buildings; and "a covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and

(*a*) *Spencer's case*, 5 Co. 16; *Bally* v. *Wells*, 3 Wils. 25.
(*b*) *Vernon* v. *Smith*, 5 B. & A. 1.
(*c*) *The Mayor of Congleton* v. *Pattison*, 10 East, 130.
(*d*) *Jourdan* v. *Wilson*, 4 B. & A. 266.

which is beneficial to the assignee as such, will go with the estate assigned?" and he defines *collateral covenants* to be such covenants as are beneficial to the lessor, without regard to his continuing the owner of the estate; but the judgments of the other judges proceeded entirely on the ground of the locality of the premises.(*a*)

*A. being seised of a mill, and of certain lands, granted a lease of the latter for years, the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, and doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises; this reservation of the suit to the mill is in the nature of a rent, and the implied covenant to render it resulting from the *reddendum*, is a covenant that runs with the land, *so long as the ownership of the mill and the demised premises belong to the same person*.(*b*)

A condition that a lessee shall not assign over his term, without license from the lessor, is a collateral *condition; and [*76] cannot be taken advantage of by the assignee of the lessor.(*c*)

The assignee of part of the reversion in all the lands demised, is an assignee within this statute, but the assignee of the reversion in part of the lands is not; for the condition being entire, cannot be apportioned by the act of the parties, but shall be destroyed. If, therefore, A. be lessee for years of three acres, with condition of re-entry, and the reversion of all the *three acres* be granted to B., *for life*, or *for years*, B. can take advantage of the breach of the condition; but if a reversion of any nature whatsoever, even *in fee*, of *two acres* only be granted to B., he cannot.(*d*)

A *cestui que use*, and bargainee of the reversion, are within this statute, because they are assignees by act of the party; but it does not extend to persons coming in by act of the law, as the lord by escheat;(*d*) nor to an assignee by estoppel only;(*e*) nor to one who is in of another's estate, and, therefore, †if the reversion, expectant on the determination

(*a*) *Vernon* v. *Smith*, 5 B. & A. 1.
(*b*) *Vivyan* v. *Arthur*, 1 B. & C. 410.
(*c*) *Lucas* v. *How*, Sir T. Raym. 250; *Collins* v. *Silley*, Stiles, 265; *Pennant's case*, 3 Co. 64.
(*d*) Co. Litt. 215.(*a*)
(*e*) *Awder* v. *Nokes*, Moore, 419.

of the term, be merged in the reversion in fee, the reversion is no longer within the statute.(*a*)

[*77] This statute is held not to extend to gifts in tail,(*b*) *but copyhold lands are within its intention and equity.(*c*)

16. Corporation aggregate or sole.[1]

It was formerly doubted whether an ejectment could be maintained by the King, because an ejectment is for an injury done to the possession, and the King cannot be put out of possession. But this reasoning seems only to apply where the King is made *plaintiff*, and not where he is the *lessor of the plaintiff;* for it is the lessee, and not the lessor, who by the legal fiction is supposed to be ousted; and it is held, that where the possession is not *actually* in the King, but in lease to another, there, if a stranger enter on the lessee, he gains possession without taking the reversion out of the Crown, and may have *his ejectment to recover the possession, if he be afterwards ousted; because there is a possession *in pais*, and not in the King, and that possession is not privileged by prerogative. Hence it follows, that the *King's lessee* may likewise have an ejectment to punish the trespasser, and to recover the possession which was taken from him.(*d*)

[*79]

In cases, however, included in the statutes 8 Hen. VI. c. 16, and 18 Hen. VI. c. 6, which prohibit the granting to farm of lands, seised into

(*a*) *Threr* v. *Barton*, Moore, 94; *Chaworth* v. *Phillips*, Moore, 876; *Webb* v. *Russell*, 3 T. C. 393, 401.

(*b*) Co. Litt. 215,(*a*).

(*c*) *Glover* v. *Cope*, Carth. 205.

(*d*) *Payne's case*, 2 Leon. 205; *Lee* v. *Norris*, Cro. Eliz. 331.

[1] In ejectment by a corporation, the court will presume the demise to have been under their corporate seal. *University of North Carolina* v. *Johnston*, 1 Hay. Rep. 375. (In note.)

Where the legal title to the soil is in a corporation or the public, it may maintain an action of ejectment to recover the possession of a street. *Mayor, &c., of Havanna* v. *The Steamboat Co. of Georgia*, Charl. Rep. 342.

In an action of ejectment brought by the assignee of a mortgagee against a mortgagor, upon a mortgage given to a corporation, it is unnecessary to produce the charter of incorporation. The admission by the defendant himself, in the deed of mortgage, is sufficient proof, when uncontradicted, of existence of the corporation. *Den ex dem. Lorillard* v. *Van Houton*, 5 Halst. Rep. 270.

Ejectments cannot be commenced against a corporation by declaration, but only by summons. *Brown* v. *Syracuse.*

the King's hands upon inquest before escheators, until such inquest shall be returned in the Chancery or Exchequer, and for a month afterwards, if the King's title in the same be not found of record, and avoid all grants *made contrary thereto, the King cannot maintain an ejectment until all the previous requisites are complied with: for, even presuming the right and possession to be in the Crown immediately on the death of the person last seised, the King has no power to grant the same until after office found, and, consequently, he must be considered to be himself in possession, and, therefore, unable to give a title to his lessee.(*a*)

17. Churchwardens and Overseers of the Poor for lands belonging to the parish.

To remedy the practical inconveniences which frequently arose from the difficulty of substantiating *a legal title to parish [*80] lands,(*b*) it was enacted by the statute 59 Geo. III. c. 12, s. 17, that churchwardens and overseers of the poor, and their successors, should take and hold *in the nature of a body corporate*, for and on behalf of the parish, all buildings, lands and hereditaments, belonging to the parish; and that in all actions, suits, and other proceedings for, or in relation to any such buildings, lands, or hereditaments, it shall be sufficient to name the overseers and churchwardens of the poor for the time being, describing them as churchwardens and overseers of the poor of the parish for which they shall act, and that no suit or other proceeding shall abate by reason of the death of any such churchwarden or overseer.

In order to constitute the body corporate intended by this act, there must be two overseers, and a churchwarden or churchwardens; and where there were two overseers appointed, one of whom was afterwards appointed (by custom,) sole churchwarden, the act did not vest parish property in them.(*c*)

†Leases of parish lands granted by churchwardens and overseers before the passing of the above statute convey no interest to the lessees, and the statute vests in the churchwardens and overseers all buildings,

(*a*) *Doe d. Hayne* v. *Redfern*, 13 East, 96.
(*b*) *Doe d. Grundy* v. *Clarke*, 14 East, 488.
(*c*) *Woodcock* v. *Gibson*, 4 B. & C. 462; *Phillips* v. *Pearse*, 5 B. & C. 433.

lands and hereditaments, belonging to the parish, not merely where the rents are applicable to the relief of the poor, but also where they are applicable to those purposes for which church rates are levied, and that although the buildings, &c., had originally been vested in trustees for the benefit of the parish.(*a*)

The legal estate in the parish land belonging to a parish forming part of an union under 4 & 5 Wm. IV. c. 76, is not devested out of the churchwardens and overseers so as to disable them from bringing ejectment, either by section 21 of that act, or by 5 & 6 Wm. IV. c. 69, s. 3. —Lord Denman, C. J., observing, that, "although the language of the late acts is so large as hardly to be consistent with the notion that any property of a parish forming part of an union remains in the parish officers, yet that language is not sufficient to devest that property out of them."(*b*)

18. Lay Impropriators for tithes.(*c*)

The statute giving this remedy for tithes, included lay impropriators only, but was subsequently extended to tithes belonging to ec-
[*81] clesiastical persons.(*d*) *But an ejectment for tithes can only be maintained against persons claiming or pretending to have title thereto, and not against such persons as refuse or deny to set them out, which is called subtraction of tithes: (*e*) nor will it lie where the tithes are not taken in kind, but an annual sum is paid in lieu thereof.(*g*)[1]

(*a*) *Doe d. Jackson* v. *Hiley*, 10 B. & C. 885; *Doe d. Higgs* v. *Terry*, 4 Ad. & El. 274; *Doe d. Hobbs* v. *Corkell*, 4 Ad. & El. 478.
(*b*) *Doe d. Norton* v. *Webster*, 4 Per. & Dav. 270.
(*c*) 32 Hen. VIII. c. 7.
(*d*) *Vide* 6 & 7 Wm. IV. c. 71.
(*e*) 2 & 3 Edw. VI. c. 13, s. 13.
(*g*) Dyer, 116,(*b*).

[1] Where a party was presented to a rectory in consideration of his having given a bond to resign in favor of a particular person, at the request of the patron, and was instituted and inducted, and such bond was held to be void on the ground that it was simoniacal, and the king then presented A. B., and he was instituted and inducted: held, that he might maintain ejectment for the rectory against the person who had been simoniacally presented. *Doe ex dem. Watson, clerk* v. *Fletcher, clerk*, 8 Barn. & Cress. Rep. 25.

In 1813, the commissioners for the inclosure of the parish, the tithes of which were vested in several lay impropriators, appointed meetings for receiving claims, and various claims

*19. TRUSTEES.[1]

In all cases in which the trusts are not executed by the Statute of Uses, the legal estate vests in the trustees, and of course, in such cases, they may maintain ejectment.

The principles upon which this doctrine is founded, *have [*82] already been discussed ;(*a*) and it therefore only remains to consider a few cases, in which the trustees have been held to take, or not to take, the legal estate.

A distinction has been made between a devise to a person in trust *to pay over* the rents and profits to another,(*b*) and a devise in trust *to per-*

(*a*) Ante, 33.

(*b*) Shep. Touch. 482; 1 Eq. Cas. Ab. 383, 384; *Shapland* v. *Smith*, Brown, Chan. Cas. 75; *Silvester d. Law* v. *Wilson*, 2 T. R. 444; *Jones* v. *Ld. Say and Sele*, 8 Vin. Ab. 262; *Broughton* v. *Langley*, Salk. 679; S. C., 1 Lut. 814; *Burchett* v. *Durdant*, 2 Vent. 311; *Tenny d. Gibbs* v. *Moody*, 3 Bing. 3.

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were put in, but none in respect of tithes, within the time limited by the general enclosure act. Notwithstanding this, the commissioners, in 1817, made an allotment in respect of the impropriate tithes of certain land occupied by him, which tithes, as well as the land, J. claimed under the will of P.; in 1820, W., who claimed these tithes under the heir of P., on the ground that they did not pass by P.'s will, brought an ejectment for the allotment made in respect of them: held, that having omitted to make his claim before the commissioners within the time limited by the act, he could not recover. *Doe ex dem. Watson* v. *Jefferson*, 2 Bingh. Rep. 118.

[1] The legal title of a trustee, under a deed of trust, with a power to sell for the payment of the debts of the *cestui que trust*, is not divested by the discharge of the debts, but the trustee may maintain ejectment. *Adam Moore* v. *The Lessee of Burnet*, 11 Ohio Rep. 334.

A trustee may recover in ejectment against his *cestui que trust*. *Beach* v. *Beach*, 14 Verm. Rep. 28; and see *Mathews* v. *Ward*, 10 Gill. & Johns. Rep. 443.

A trustee may bring ejectment for lands, and a wrong doer cannot set up the title of the *cestui que trust*. *Hunt* v. *Crawford*, 3 Penn. Rep. 426.

Ejectment may be maintained by the heirs at law of the surviving trustee, the suit not being adverse to the *cestui que trust*. *Crunkleton* v. *Evert*, 3 Yeates', 570.

Where a power is granted to surviving trustees, under a will, to appoint substitutes, they may convey the legal estate to a third person, with the assent of the *cestui que trust;* and such conveyance will authorize the third person to bring ejectment in his own name. *Mitchell* v. *Stevens*, 1 Aiken's Rep. 16.

In North Carolina it has been held, that the grantee of a trustee may maintain ejectment, although the conveyance is not authorized by the trust. *Canoy* v. *Troutman*, 7 Iredell, 155.

An action of ejectment may be maintained by a trustee against his *cestui que trust*, unless, as under certain circumstances may be done, a conveyance of the legal title is presumed, *Mathews* v. *Ward's Lessee*, 10 Gill. & Johns. Rep. 443.

mit some other person to receive the rents and profits; the legal estate, in the first case, being held to be vested in the trustee, and, in the latter, in the *cestui que trust;* though, to use the words of Sir James Mansfield, C. J., "It seems miraculous how such a distinction became established; for good sense requires that in both cases it should be equally a trust, and that the estate should be executed in the trustee;—for how can a man be said to permit and suffer, who has no estate, and no power to hinder the *cestui que trust* from receiving?"(*a*) It has, indeed, in several cases, been argued, that a devise to trustees to receive the rents and profits, and pay them over, will not vest the legal estate in the trustees, unless something is required of the trustees which renders it necessary that they should have an interest in the lands, as to pay rates and taxes, &c.; but this doctrine has not yet been sanctioned by
[*83] any decisions of the Courts; though *certainly it has happened in all the latter cases, that *the trustees have been required to do other acts, as well as to pay the rents and profits.(*b*)

In cases where it is necessary for the purpose of the trust that the trustees should take the legal estate, it will be held to vest in them, though the devise be that *they suffer and permit the cestui que trust* to receive the rents and profits; as where the trust was *feme covert* to receive the rents and profits during her natural life, for her sole and separate use, they were held to have the legal estate; such construction being necessary to give legal effect to the testator's intention to secure the beneficial interest to the separate use of the *feme covert.*(*c*) And where lands were conveyed to the trustees in trust, with the consent of A., to sell the inheritance, with a proviso, that the rents, until such sale should *be received by such person, and for such uses,* as they would have been if the deed had not been made, it was held that the estate was executed in the trustees; and that it was not a mere power of sale annexed to the legal estate of the owner.(*d*)

[*84] *In like manner, where the devise was to A. in trust, to permit and suffer the testator's widow to have, hold, use, occupy,

(*a*) *Doe d. Leicester* v. *Biggs*, 2 Taunt. 109, 113.

(*b*) *Jones* v. *Ld. Say and Sele*, 3 Vin. Ab. 262; *Kenrick* v. *Lord Beauclerk*, 3 B. & P. 175; *Doe d. Hallen* v. *Ironmonger*, 3 East, 533; *Doe d. Stevens* v. *Scott*, 4 Bing. 505; *White* v. *Parker*, 1 B. N. C., 573.

(*c*) *Harton* v. *Harton*, 7 T. R. 652.

(*d*) *Keene d. Ld. Byron* v. *Deardon*, 8 East. 248; so also of a devise on trusts to convey; *Doe d. Booth* v. *Field*, 2 B. & Ad. 564; *Doe d. Shelley* v. *Edlin*, 4 A. & E. 582.

possess, and enjoy the full free and uninterrupted possession and use of all interest of moneys in the funds, and rents and profits arising from the testator's houses for her natural life, if she should remain unmarried; and that her receipts for all rents, &c., with the approbation of any of the trustees, should be good and valid, she providing for and *educating properly the testator's children, and also paying certain annuities; and in case the window should marry again, then upon certain other trusts; it was held that the use was executed in the devisees in trust, and upon this ground, that the testator, having made the approbation of the trustees necessary to the widow's receipts, showing that he did not intend to give her a legal estate; and Gibbs, J. said, "The rule has been misconceived. Though an estate be devised to A. and his heirs, to the use of B. and his heirs, the Courts will not hold it to be an use executed, unless it appears by the whole will to be the testator's intent that it should be executed. The Courts will rather say the use is not executed, because the approbation of the trustee is made necessary, than that the approbation of a trustee is not necessary because the use is executed. The very circumstance which is to discharge the tenants, is the approbation of one of the trustees. 'I leave my wife to receive the rents, provided there is always the control of one of the trustees upon her receipts.'—The testator, therefore, certainly meant that some control should be exercised, *and what could that [*85] control be, except they were to exercise it in the character of trustees?"(*a*)

Where certain *freehold and leasehold* premises were devised to trustees, "to *permit and suffer* the testator's wife to receive and take the rents and profits," and other lands were devised to the same trustees, upon trusts clearly not executed by the statute, and immediately after the last of the different devises a proviso followed, "that it should be lawful for the trustees, at any time, till *all* the said lands, &c., devised to them, *should actually become vested in any other person or persons, by virtue of the will, or until the same, or any part thereof, should be absolutely sold, as aforesaid, to lease the same, or any part thereof*," it was holden that the legal estate in the freehold lands contained in the first devise, vested in the †widow, notwithstanding that *leasehold* premises were contained in the same devise, (the legal interest in which, of course, vested in the trustees,) and the subsequent leasing power given

(*a*) *Gregory* v. *Henderson*, 4 Taunt. 772.

by the will, "the trustees having no control over the lands in the first devise for *any purposes of the testator's will.*"(*a*)

[*86] *Where the devise was, that the trustee *should pay unto*, or else *permit and suffer* the testator's niece *to receive* the rents, the legal estate was held to be in the niece, because the words "to permit and suffer" came last; and in a will, the last words prevail, though in a deed the first.(*b*)

In a case where the devise was, "I give and bequeath *my real estates, lands, &c.*, and also my personal estate, &c., to A. B., upon trust to the intent that the said A. B., his heirs, &c., shall first dispose of my personal estate, or so much thereof as shall be sufficient for that purpose, in payment of my debts, &c., *and as to all my real estates, wheresoever and whatsoever, subject to my debts, and such charge or charges as I may now, or at any time or times hereafter, think proper to make, I give, devise, and bequeath the same to C. D., for the term of his natural life*, with remainder to E. F., &c.," it was holden that the legal estate was vested in C. D., because an intention that the trustees should pay the debts, was not apparent on the face of the will, and, therefore, there was no reason for giving the legal estate to the trustees.(*c*)

Where freehold estates are devised to trustees, difficult questions frequently arise, as to the *quantum* of estate taken by the [*87] trustees, which it would be foreign to the *purposes of this treatise to discuss; but it may be laid down as a general principle, that, previously to the introduction of the statutory rules of construction presently noticed, a devise to trustees, if it give them any estate, would give them such estate as would have passed by similar words in a beneficial devise, unless the exigencies of the trust could be satisfied with less. But that, if the exigencies of the trust could be so satisfied, (as, for example, by a freehold estate *pour autre vie*, where the only trust was for the life of the *cestui que trust*, or by an indefinite chattel interest, where the trust was to raise a sum of money,) the use of language, which in a beneficial devise would have passed the fee, would not preclude a more limited construction, so that the less estate only should be

(*a*) *Right d. Phillips* v. *Smith*, 12 East, 455.

(*b*) *Doe d. Leicester* v. *Biggs*, 2 Taunt. 109; Mansfield, C. J., in delivering the judgment of the Court in this case, said, the reason they assigned for their decision was given for want of a better.

(*c*) *Kenrick* v. *Beauclerk*, 3 B. & P. 175.

taken, and not the fee.(*a*) And, of course, in such cases, the trustees could not, after the determination of such less estate, maintain ejectment.

The same rule still prevails, except in those cases which are affected by the statutory rules of construction, introduced by the Stat. 1 Vict. c. 26, ss. 30, 31.

By the 30th section of that act, it is enacted, that "where any real estate (other than or not being a presentation to a church,) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest, which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly, or by implication." And, by the 31st section, that, "where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person *for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee, the fee simple or other the whole legal estate which the testator had power to dispose of, by will, in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

The operation of these two sections, so far as it is material to the present Treatise, appears to be, that they leave untouched the principal question, *viz.* whether the legal estate is executed in the trustee or in the *cestui que trust;* but that, assuming some estate to be vested in the trustee, they operate on the amount of such estate: the 30th clause directing that the whole estate shall pass, unless the devise be expressly or by implication confined to a definite term or an estate of freehold; and the 31st providing that no such implication shall be drawn from the limited exigencies of the trust, unless where the only trust is for a life estate.(*b*)

(*a*) *Doe d. Tomkyns* v. *Willan*, 2 B. & A. 84; *Doe d. Keen* v. *Walbrook*, 2 B. & Ad. 554; *Nash* v. *Coates*, 3 B. & Ad. 839; *Doe d. Rees* v. *Williams*, 2 Mee. & W. 749; *Doe. d Davies* v. *Davies*, 1 Q. B. Rep. 430; *Ackland* v. *Pring*, 3 Scott, N. S. 297.

(*b*) See these sections commented on in 2 Jarman on Wills, 229; Sugden on Wills, 119.

As the Statute of Uses mentions only such persons as are *seised* to the use of others, it has been held not to extend to terms of years, or other chattel interests, whereof the termor is not *seised*, but only *possessed;* and therefore, when only a term of years is created, whatever the nature of the trusts may be, the statute does not execute the uses, but the legal estate always vests in the trustees.(*a*) Such terms do not cease when the trusts are satisfied, unless by special proviso in the deed itself; so that the legal estate, however ancient the term may be, and notwithstanding it may have been assigned to attend the inheritance, will always remain outstanding in the trustees until it has been [*88] *surrendered to the party beneficially interested, or merges in a larger estate. The practical inconveniences arising from this rule of the *common law as regards the legal rights of the *cestui que* [*89] *trust*, have given rise to the doctrine of presumed surrenders; *and juries have been directed to presume that regular surrenders have been made by the trustees of such terms, so as thereby to clothe the *cestui que trust* with the legal estate, and enable him to recover in ejectment, without burthening the case with demises by the trustees or their representatives, or the costly proofs necessary thereon.[1] Thus surrenders have been presumed if the purposes of the trust estate have been satisfied;(*b*) or if the beneficial occupation of the estate by the possessor induces a supposition, that a conveyance of the legal estate has been made to the party beneficially interested;(*c*) or where it is for the interest of the owner of the inheritance, that the term should be considered as surrendered,(*d*) or when the trust is a plain one, and a Court of Equity would compel the trustees to make a conveyance.(*e*) But such presumptions will not be made if the surrender be a breach of the trust; or against the owner of the inheritance who is interested

(*a*) *Dillon* v. *Fraine*, Poph. 70, 76; Dyer, 369; Jenk. 244.
(*b*) *Doe d. Hodson* v. *Staple*, 2 T. R. 684; *Doe d. Davies* v. *Davies*, 1 Q. B. R. 430.
(*c*) *Doe d. Rees* v. *Williams*, 2 M. & W. 749.
(*d*) *Doe d. Burdett* v. *Wright*, 2 B. & C. 710.
(*e*) *Doe d. Syburn* v. *Slade*, 4 T. R. 682.

[1] In Pennsylvania, ejectment may be maintained by a *cestui que trust* in his own name, 1 Dallas' Rep. 72; after the purposes of the deed have been satisfied, a *cestui que trust* may maintain ejectment upon a demise in his own name, although the *legal* estate is still in the trustee, *Hopkins* v. *Ward*, 6 Mumford, 38; a *cestui que trust* may maintain ejectment to recover land, to the possession of which he is entitled, either against a trustee or a stranger. *Presbyterian Congregation* v. *Johnson*, 1 Watts & Serg. Rep. 9; S. P. *School Directors* v. *Dunkleberger*, 6 Barr. 29; but see *Obert* v. *Bordine*, 1 Spencer, 394.

in upholding it;(*a*) or where the title of the party, for whom the presumption is required, is a doubtful equity only, until a Court of Equity has first declared in favor of the equitable title;(*b*) nor can the presumption be made by the Court, where the merits of the case would have warranted such presumption at the trial, if it appear, upon a special verdict, or special case reserved for their opinion, that the trust estate, though satisfied, is still, in point of fact, outstanding in the trustees.(*c*)

But this doctrine of presumed surrenders seems to be *abolished by the provisions of the statute 8 & 9 Vict. c. 112, ss. 1 and 2.

By sect. 1 of that statute, it is enacted "that every satisfied term of years which, either by express declaration or by construction of law, shall, upon the 31st day of Dec. 1845, be attendant upon the inheritance or reversion of any lands shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the said 31st day of December, 1845, and shall, for the purpose of such protection, be considered in every Court of Law and of Equity to be a subsisting term."

By sect. 2, it is enacted "that every term of years now subsisting, or hereafter to be created, becoming satisfied after the said 31st day of December, 1845, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall, immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid."

The operation of these sections appears to be, that an outstanding term made attendant upon the inheritance by express declaration before December 31st, 1845, is still to be considered as existent for the purpose of such protection to all persons as it would have afforded to them

(*a*) *Doe d. Graham* v. *Scott*, 11 East, 478.

(*b*) *Keene d. Lord Byron* v. *Deardon*, 8 East, 248.

(*c*) *Goodtitle d. Jones* v. *Jones*, 7 T. R. 43; *vide Doe d. Pullard* v. *Hilder*, 2 B. & C. 782; *Doe d. Blacknell* v. *Plowman*, 2 B. & Ad. 573.

before the passing of the statute. Such terms, therefore, must hereafter be deemed existent or non-existent at the trial of any ejectment, as the same shall or *shall not afford a protection within the meaning of the statute, to the party setting up the term, so that a surrender *cannot* in such cases be presumed; and with respect to all other cases, it is expressly declared, that a satisfied attendant term (subject of course to any questions as to what constitutes satisfaction) is *ipso facto* determined, and consequently it is unnecessary to call in aid the doctrine of presumed surrender.

[*91] *Where the demised premises are settled for life on A., with power to charge the estate with portions, and power to grant leases for twenty-one years; and A. granted and appointed the same for five hundred years to trustees upon trust, if she should by deed so appoint, to raise such portions; and after such grant and appointment, leased the premises for twenty-one years to B.; it was held, that taking the whole deed together, the term, until it was called into action, was subservient to the leasing power; and was therefore no answer to an ejectment brought by B.(*a*)

It seems to have been held, in the case of *Roe d. Ebrall* v. *Lowe*,(*b*) that a *bona fide* lease, made by an equitable tenant in tail, will prevent the trustees, in whom the legal estate is vested, from recovering in ejectment against the lessee; although, if the lease be granted under suspicious circumstances of fraud and imposition, the trustees will not be barred. But this principle cannot now be supported, and a lease from the *cestui que trust* cannot be set up against the trustee in any case, without the aid of a Court of Equity.(*c*)

Copyhold estates also are not comprehended within the Statute of Uses; because a transmutation of possession, by the sole operation of the statute, without the concurrence or permission of the lord, would be an infringement of the lord's rights, and would tend to his prejudice; and therefore, if a copyhold †be surrendered to A. to the use of B., the legal estate will not be transferred to B., though he would be entitled in equity to the rents and profits, and to call upon A. for a surrender of the estate.(*d*)

(*a*) *Doe d. Courtail* v. *Thomas*, 9 B. & C. 288.
(*b*) 1 H. Bl. 446.
(*c*) *Baker* v. *Mellish*, 10 Ves. Jr. 544.
(*d*) Co. Cop. s. 54, Gilb. Ten. 182.

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20. Joint Tenant, Co-parcener, or Tenant in common, against his companion on an actual ouster.[1]

[1] One tenant in common may maintain ejectment against his co-tenant, though no actual ouster be proved. Per Spencer, J., *Shephard* v. *Ryers*, 15 Johns. Rep. 501; see *Eades* v. *Rucker*, 2 Dana, 111.

One tenant in common cannot, in general, maintain an action of ejectment against his co-tenant without actual ouster. *Barnitz's Lessee* v. *Casey*, 7 Cranch's Rep. 456; *Jones* v. *Perkins*, Stewart's Rep. 512.

Tenant in common cannot convey to his co-tenant during the continuance of an outstanding adverse possession in a third person. *Constantine* v. *Van Winkle*, 6 Hill, 177.

If one have title as tenant in common, and be in possession, he is presumed to hold for himself and his co-tenants; but such presumption may be rebutted by proof of acts or declarations indicating an intention to exclude his co-tenants. Such as a disavowal of his holding as a tenant in common, and if he in fact keeps out his co-tenants, such acts and declarations constitute an *ouster*, and his posssession from that time bec mes *adverse* within the meaning of the statue. *Humbert* v. *Trinity Church*, 24 Wen. 587.

But possession of twenty-seven years by one tenant in common, although during all that time the right of the co-tenant had not been recognized, was not held sufficient to authorize a jury to presume on *ouster* in a case in which, before twenty-five years had elapsed, the co-tenant had made an actual entry upon the land and was forcibly expelled. *Northrop* v. *Wright*, 24 Wen. 221.

A parent, having a possessory title to lands, dies in possession, leaving several children his heirs at law, who succeed to such possessions—one or more of such heirs who have obtained the exclusive possession of the whole of the premises cannot defeat a recovery by their co-heirs of their proportionate parts or shares, by setting up a title acquired from the owners of the land—to avail themselves of such title they must first surrender possession to their co-heirs, and then bring ejectment. But, under a title thus acquired, it seems an adverse possession may be set up in bar of a recovery, when no disabilities exist, if the possession under such title is hostile in its inception to the rights of the claimants and be continued for a sufficient length of time. *Phelan and wife* v. *Kelly*, 25 Wen. 389.

If defendant in ejectment sets up that he is tenant in common with the plaintiff, with the view of putting the latter to the proof of an ouster, he must connect himself with the title under which the plaintiff claims—but he may show title out of the plaintiff, and thus defeat the action, without connecting himself with it. *Gillet* v. *Stanley*, 1 Hill, 121.

In ejectment it appeared that the defendant's father occupied a farm under a lease made by one from whom the plaintiff derived title—that the premises in question, four acres, were part of the farm. On the expiration of the lease, defendant, who lived with his father, remained in possession of the farm as tenant at sufferance to the plaintiff for a short time, and then took from the latter an agreement for a lease for life of it, that a lease was afterward executed, which however did not embrace the four acres—on discovering which, defendant told plaintiff he would not be bound by it, but meant to insist on occupying the whole farm, and continued so to do—and plaintiff afterwards, and before bringing the suit, executed a life lease of the four acres to a third person. Held that defendant's possession did not constitute such an adverse holding as rendered the last mentioned lease void, and therefore the plaintiff's right of recovery was barred by this outstanding title. *Livingston* v. *Proseus*, 2 Hill, 526.

An assertion by a joint owner of lands of an exclusive right to the whole, and a contracting to sell the whole, are evidence of adverse possession, and such an ouster as to enable the co-tenant to maintain ejectment. *Carpenter* v. *Thayer et al.*, 15 Verm. Rep. 552.

It is a maxim of the common law, that the possession of one joint tenant, parcener, or tenant in common, is *prima facie* the possession of his companion also.(*a*) And it therefore follows, that the possession of one joint tenant can never be considered by the common law as adverse to the title of the other, unless it be attended by circumstances demonstrative of an adverse intent; or, in other words, whenever one joint tenant, parcener, or tenant in common is in possession, his fellow is, *in contemplation of the common law*, in possession also, and it is necessary, in order to enable his companion to maintain ejectment, to rebut this presumption by proof of *an actual ouster*.

Many subtile distinctions have been heretofore taken as to what acts shall be deemed to amount to an actual ouster;(*b*) and it was in one case expressly decided that the bare perception of the whole profits for twenty-six years without accounting was insufficient;(*c*) but these difficulties are ended by stat. 3 & 4 Wm. IV. c. 27, s. 12, which abrogates this maxim of the common law, and enacts that when any person entitled to any land or rent as co-parcener, joint tenant, or tenant in common, shall have been in possession or receipt of *the entirety, or more

(*a*) *Ford* v. *Gray*, Salk. 285; *Smales* v. *Dale*, Hob. 120; *Doe d. Barnet* v. *Keen*, 7 T. R. 386.

(*b*) *Doe d. Fisher* v. *Prosser*, Cowp. 217; *Doe d. Hellings* v. *Bird*, 11 East, 49; Vin. Ab. V. 14, 512; *Peaceable d. Hornblower* v. *Read*, 1 East, 568, 574; *Story* v. *Windsor*, 2 Atk. 630, 632; *Doe d. Thorn* v. *Phillips*, 3 B. & Ad. 752; *Doe d. Wawn* v. *Horn*, 5 M. & W. 564.

(*c*) *Fairclaim d. Fowler* v. *Shackleton*, Bur. 2604.

In ejectment against a tenant in common by a co-tenant, if the jury return a special verdict, *actual ouster* must be found therein, to entitle the plaintiff to judgment. *Taylor et al.* v. *Hill*, 10 Leigh's Rep. 457.

Deed for the whole land made by one tenant in common to a third person, is color of title, under which possession by the purchaser for a sufficient length of time, would divest the title of his co-tenant. *Ross* v. *Durham*, 4 Dev. & Bat. 54.

A tenant in common cannot recover upon a joint demise. *Gaines* v. *Buford*, 1 Dana, 483.

See *Smith* v. *Starkweather*, 5 Day, 207; *Chesround* v. *Cunningham*, 3 Blackf. 82; *Bush* v. *Bradley*, 4 Day, 298; *Barnitz* v. *Casey*, 7 Cranch. 456; *Clark* v. *Vaughan*, 3 Conn. 191; *Hargrave* v. *Powell*, 2 Dev. & Batt. 97; *Hicks* v. *Rogers*, 4 Cranch, 165; *Innis* v. *Crawford*, 4 Bibb. 241; *Harrison* v. *Botts*, 4 Bibb. 420; *Wathen* v. *English*, 1 Miss. 746; *Dube* v. *Smith*, 1 Miss. 313.

A tenant at will can maintain an action of ejectment. *Buntin* v. *Doe*, 1 Blackf. 26.

One of several co-parceners may maintain ejectment on her separate demise. *Jackson* v. *Sample*, 1 John's Cas. 232.

See *Chiles* v. *Cowley*, 9 Dana, 385; *Birney* v. *Birney*, 16 Vermont Rep. 136; *Harmon* v. *James*, 7 Smedes and Marsh. Rep. 111; *Craig* v. *Taylor*, 6 B. Monroe Rep. 457.

than his undivided share of the land or rent, for his own benefit or the benefit of any person other than the person entitled thereto, such possession or receipt shall not be deemed to have been the possession or receipt of the person so as aforesaid entitled.

It follows as a corollary from this enactment, that one joint tenant, parcener, or tenant in common, may always maintain ejectment against his companion, who is in possession of more than his share of the land, or receipt of more than his share of the rent; because such possession is no longer the possession of his co-tenant.

This 12th section of the statute 3 & 4 Wm. IV. c. 27, has a retrospective operation, and makes the possession of tenants in common, &c., separate from the commencement of the tenancy in common, &c., and not merely from the time of the act passing; the statute, therefore, runs from the commencement of the tenancy.(*a*)

21. Lunatic.

The ejectment must be brought in the name of the lunatic; for his committee is but a bailiff, and has no interest in the land.(*b*)

22. An Attainted Felon, before office found.(*c*)

23. Possession, unaccompanied by acknowledgment of title in another person.

It has already been observed that possession is *prima facie* *evidence of ownership;(*d*) and as between two parties who rely upon possession solely, the presumption of ownership is in favor of the first possessor;(*e*) so that proof of possession by a claimant, however short, will entitle him to recover unless the defendant can account for such possession, or show a prior possession or title in himself or a third person.

(*a*) *Sulley* v. *Doe d. Taylerson*, 11 Ad. & El. 1008.

(*b*) *Drury* v. *Fitch*, Hutt. 16; *Cocks* v. *Darson*, Hob. 215; *Knipe* v. *Palmer*, 2 Wils. 130; *sed vide* 43 Geo. III. c. 75.

(*c*) *Doe d. Griffiths* v. *Pritchard*, 5 B. & Ad. 765.

(*d*) Ante. p. 28.

(*e*) *Doe d. Hardinge* v. *Cooke*, 7 Bing. 346.

The stat. 3 & 4 Wm. IV. c. 27, enacts, that every claimant to lands must enforce his right, and pursue his remedy within twenty years next after his right of entry accrues, (excepting of course those cases of disability which are specially provided for,) and defines, with great precision, the time at which, in every case, the right shall be taken to have first arisen, and the modes by which it is to be enforced; and it is enacted, by section 27, that, "at the determination of the period limited by the act to any person," for enforcing his right, "the right and title of such person to the land shall be extinguished:" but the statute does not go on to say in whom the right and title shall vest.

When two or more wrong doers are successively in possession of land to which the right and title of the real owner is extinguished, the result of the joint operation of the provisions of this statute, and the rules of the common law, with respect to rights accruing from mere possession, appears to be as follows, namely, that the right to such land vests, as soon as the right of the real owner is extinguished, in the party who was in possession at the time when such extinguished right first accrued; and continues in him until the expiration of twenty years after the cessor of his possession, during which period he may consequently maintain ejectment, when it vests in the next possessor, and so on. As thus, A. being in possession when the extinguished right of the real owner commenced, remains in possession five years, when he is ousted by B., who remains in possession ten years, when he is ousted by C., who remains in possession until twenty years have expired, from the period when such extinguished right first accrued. For the first five years after the right is extinguished, C. will have a good defence against an ejectment brought by B., by showing the prior possession of A.; but, as against A., he will have no defence; for, he cannot set up the extinguished right of the real owner, or any priority of possession in another, because such possession must have been before the commencement of the twenty years; and, during the next ten years, C. has a good defence as against A., because he has not enforced the right arising from his possession (whatsoever, under the provisions of the statute, may be the nature of that right,) within the statutory period, but has no defence as against B.; and, after the expiration of such ten years, C.'s title is good as against all the world.

If this view of the operation of the statute be correct, the respective rights of A., B. and C. would remain unaltered, although the real owner

should regain possession of the land, after his right has been extinguished by the operation of the statute.

24. And to these we may add, that AN AWARD, UNDER A SUBMISSION TO ARBITRATION, will give a good title, by way of estoppel, on which to maintain this action; for, although the award cannot have the operation of conveying the *land, there is no reason why [*92] the defendant may not conclude himself, by his own agreement, from disputing the title of the lessor of the plaintiff in ejectment. The parties consent that the award of an arbitrator, chosen by themselves, shall be conclusive, as to the right of the land in controversy between them; and this is sufficient to bind them in the action of ejectment.(a)

(a) *Doe d. Morris* v. *Rosser*, 3 East, 15.

*CHAPTER IV.

Of the Action of Ejectment as between Landlord and Tenant.

In the preceding Chapter, those cases have been considered in which it is incumbent upon the claimant to prove his title to the disputed premises. It will be now necessary to consider the action with reference to those cases in which such proof is not requisite; that is to say, in which the defendant has obtained possession under some contract or agreement with the claimant, express or implied, and his right to the possession has ceased. The relationship of landlord and tenant exists to some extent in all these cases, and the rights of such parties with regard to this remedy, and the several modes by which tenancies may be determined, will form the subject of the present Chapter.

The power of determining a tenancy is necessarily consequent upon the right of creating one; and the law implies a mutual reservation of such power in all contracts between landlords and tenants, whenever it is not expressly reserved. Whenever such power is expressly reserved, as, for example, in tenancies for terms certain, or until A. B. shall attain twenty-one, or so long as the tenant shall perform certain covenants, and the like, the determination of the tenancy is, of course, dependent upon the terms of the reservation; and the tenancy will cease when the term ends, the event happens, or the covenants are broken; but if there be no express reservation, but the party is let into possession as tenant under a general holding, the law creates between the parties a tenancy from year to year, determinable by a notice to quit from either of them.[1]

[1] Where a lease is to expire at a time certain, a notice to quit is not necessary, in order to recover in ejectment. *Bedford* v. *M'Elherron*, 2 Serg. & R. Rep. 49.

A notice to quit is not necessary where the relation of landlord and tenant does not exist. *Jenkins* v. *Robinson*, 4 Wen. 436; *Den* v. *Adams*, 7 Halst. Rep. 99; see *Adams* v. *Buford*, 6 Dana's Rep. 408.

Where A., by his attorney, executed a lease to B. for three years, and after the expiration of the term, B. applied to the attorney, to know if he was authorized by A. to enter into a new agreement, and the attorney replied that he was not, but said that B. might continue in possession of the premises, until he heard from A.: held, that B. was, after the ex-

*When tenancies are determined by the efflux of time, or the happening of a particular event, the right of entry in the landlord at once

piration of the term, a mere tenant at sufferance, and not entitled to notice to quit previous to the bringing of an action of ejectment. *Jackson ex dem. Van Cortlandt* v. *Parkhurst et. al.*, 5 Johns. Rep. 128.

To entitle the defendant to notice to quit, there must be a privity either of contract or of estate between the lessor and the defendant. *Jackson ex dem. Ferris* v. *Fuller*, 4 Johns. Rep. 215.

There must be a tenancy, or existing relation of landlord and tenant. *Jackson ex dem. Whitbeck* v. *Deyo*, 3 Johns. Rep. 422, S. P.; *Jackson ex dem. Phillips* v. *Aldrich*, 13 Johns. Rep. 106.

A tenant at will is not entitled to notice to quit. *Jackson ex dem Vandenberg et al.* v. *Bradt*, 2 Caines' Rep. 129; (sed vide *Jackson ex dem Livingston* v. *Wilson*, 9 Johns. Rep. 267, in which the Court seem inclined to the opinion that he is entitled to notice.)

If a person holding under adverse title, make application to the lessor of the plaintiff to be deemed his tenant, there is no tenancy created, and he is not entitled to notice. *Jackson ex dem Viely et al.* v. *Cuerden*, 2 Johns. Cas. 253.

Where the defendant had originally entered adversely, a permission by one of the lessors of the plaintiff to continue in possession, and a disclaimer by the defendant to hold adversely, will not constitute him tenant so as to entitle him to notice to quit. *Jackson ex dem. Dill et al.* v. *Tyler*, 2 Johns. Rep. 444.

A servant or bailiff in the possession of lands, is not entitled to a notice to quit. *Jackson ex dem. Fitzroy et al.* v. *Sample*, 1 Johns. Cas, 231.

If a person holding land in virtue of a parol gift, and who is consequently but a tenant at will, lease the land, and the donor merely permit the lessee to build and enjoy the term, the relationship of landlord and tenant is not created, and the lessee is not entitled to notice to quit. *Jackson ex dem. Van Alen* v. *Rogers*, 1 Johns. Cas. 33; S. C., 2 Caines' Cas. Err. 314.

A. entered on the land of B., with his permission, as a mere occupant, without any rent being reserved; B. sold the land to C., under whom A. continued in possession, and afterwards sold all his right, &c., to D., who took possession, and claimed to hold under the deed from A.; this disclaimer was held, to be sufficient to dispense with a previous notice to quit. *Jackson ex dem. Locksell et al* v. *Wheeler*, 6 Johns. Rep. 272; see *Tuttle* v. *Reynolds*, 1 Verm. Rep. 80; *Catlin* v. *Washburn*, 3 Verm. Rep. 26.

Notice to quit is necessary in all cases of uncertain tenancy. *Den* v. *Drake*, 2 Green's Rep. 523.

Where the term has been forfeited, notice to quit is not necessary. *Lane's Lessee* v. *Osment*, 9 Yerger's Rep. 86.

But when the disclaimer was after the date of the demise, and no notice to quit was shown, or other determination of the tenancy, so as to prove a right of entry, the plaintiff was non-suited. Ib.

As to when notice to quit is unnecessary, see further; *Jackson* v. *M'Leod*, 12 Johns. 182; *Bates* v. *Austin*, 2 A. K. Marsh. 270; *Ross* v. *Garrison*, 1 Dana, 35; *Jackson* v. *French*, 3 Wend. 337; *Hamit* v. *Lawrence*, 2 A. K. Marsh. 366; *Phillips* v. *Covert*, 7 Johns. 1; *Mosheir* v. *Reding*, 3 Fairf. 478; *Williams* v. *Hensley*, 1 A. K. Marsh. 181; *Clapp* v. *Paine*, 6 Shepl. 264; *Stockwell* v. *Marks*, 5 Shepl. 455; *Dorrell* v. *Johnson*, 17 Pick. 263; *Allen* v. *Jaquish*, 21 Wend. 628; *Kinsley* v. *Ames*, 2 Metc. 29; *Hollis* v. *Pool*, 3 Metc. 350; *Chilton* v. *Niblett*, 3 Humph. 404.

accrues, and he may proceed to recover the premises without notice or demand of possession.(*a*) No comments, therefore, are necessary upon this division of the subject, but it will be necessary to enter fully into the principles by which tenancies from year to year are governed, and the rules which have been laid down for the regulation of the rights of re-entry for the breach of covenants and conditions.

Firstly, as to tenancies from year to year.

[*105] *It has already been observed, that until the reign of King Henry VII., even a tenant, having a lease of lands for a definite period, had not a full and complete remedy when ousted of his possession.(*b*) The tenants, who, during those times, occupied lands without any specific grant, held them by a far more precarious tenure. A general occupation of lands, that is to say, a holding without any certain or determinable estate being limited therein, was then considered as a holding at the will and pleasure of the owner of the land; and the tenant was liable to be ejected, at any moment, by the simple determination of his landlord's will. But the same enlightened policy which secured to lessees for years the complete possession of their terms, soon extended itself also to those general holdings, then [*106] called tenancies *at will; and in the reign of King Henry VIII.,(*c*) we find it holden by the Courts, that a general occupation should be considered to be an occupation from year to year: and that a person so holding should not be ejected from his lands, without a reasonable notice from his landlord to relinquish the possession.

(*a*) *Roe d. Jordan* v. *Ward*, 1 H. Blk. 97.
(*b*) *Ante*, p. 8.
(*c*) 13 Hen. VIII. 15,(*b*).

Where A., a lessee, agreed to sell his lease to B. for a certain sum, and indorsed his name on the lease, and delivered it to B., who paid him the purchase money, and agreed to pay the rent in arrear, and to become due on the lease; held, that this was an agreement for a sale, and that the relation of landlord and tenant did not exist between them, so as to entitle B. to a notice to quit. *Jackson ex dem. Stewart* v. *Kingsley*, 17 Johns. Rep. 158.

Tenant dies intestate in possession of certain premises. His widow, after continuing to occupy for several years, paying rent to the landlord, marries a second time, and her husband enters into possession, and pays rent for several years to the landlord; and upon the death of the wife, the personal representative of the first husband obtains administration of his estate and effects, and brings ejectment to evict the second husband; held, that the action was maintainable without giving a formal notice to quit. *Doe* v. *Bradbury*, 2 Dowl. & Ryl. Rep. 706.

It was also, at the same time, settled that this reasonable notice should be a notice for *half a year, expiring at the end of the tenancy; because otherwise, a notice, reasonable as to duration, might be given, which would, notwithstanding, operate greatly to the prejudice of the tenant, by ejecting him from his lands immediately before the harvest, or other valuable period of the year: and this rule has remained unaltered to the present day, except where a different time is established, either by express agreement, or immemorial custom.(*a*)

A general occupation of land now, therefore, as has been already observed, enures as a tenancy from year to year, determinable, and necessarily determinable,(*b*) by a notice to quit;[1] and a holding merely at the will of the landlord, according to the ancient meaning of the term, is an estate unknown in modern times,(*c*) unless when created by express agreement between the parties.(*d*) There is, indeed, an implied modern tenure denominated a tenancy at will, but it differs materially from the old tenancy so called, and in truth is scarcely *distinguishable from a mere permissive occupation of [*107] the land, independent of the relationship of landlord and tenant. This kind of tenancy arises when the party is in possession of

(*a*) *Parker d. Walker* v. *Constable*, 3 Wils. 25.
(*b*) *Doe d. Warner* v. *Brown*, 8 East, 165.
(*c*) *Timmins* v. *Rawlinson*, 3 Burr. 1603–9.
(*d*) *Richardson* v. *Langridge*, 4 Taunt. 128.

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[1] A tenant for one year holding over is a tenant from year to year, and entitled to notice to quit before ejectment can be brought against him. *Wood* v. *Salmon*, 4 Wen. 327.

A person coming in under such tenant, is entitled to the same notice. Ib.

A person entering upon land with the permission of the owner, as an occupant, without reserving any rent, and with leave to make improvements, will, after eighteen years' possession, be considered a tenant from year to year, and as such, entitled to notice to quit. *Jackson ex dem. Livingston* v. *Bryan*, 1 Johns. Rep. 322.

And where the person who originally entered, sold his improvements to a third person, who took possession; held, that such third person was entitled to a notice to quit.

See *Lloyd* v. *Cozens*, 2 Ashmead, 131; *Den* v. *Blair*, 3 Green. 181; *Morehead* v. *Watkins*, 5 B. Monroe, 228; *Godard* v. *Railroad Co.*, 2 Richardson, 346; *Moore* v. *Beasley*, 3 Ham. 294; *Den* v. *Marshall*, Martin & Yerger's Rep. 255; *Jackson* v. *Salmon*, 4 Wend. 327; *Hanchet* v. *Whitney*, 1 Verm. Rep. 315; *Logan* v. *Herron*, 8 Serg. & Rawle, 459.

There must be three months' notice to quit in Pennsylvania. 2 Ashmead, 131.

Half a years' notice is necessary in New Jersey. 3 Green. 181.

The notice in Kentucky is six months, 5 B. Monroe, 228; and the same in Vermont, 1 Verm. Rep. 315

the premises with the privity(*a*) and consent of the owner, no express tenancy having been created, and no act having been done by the owner impliedly acknowledging such party as his tenant. As where he has been let into possession pending a treaty for a purchase[1] or a

(*a*) *Doe d. Knight* v. *Quigley*, 2 Camp. 505; *Right d. Lewis* v. *Beard*, 13 East, 210; *Hegan* v. *Johnson*, 2 Taunt. 148; *Doe d. Leeson* v. *Sayer*, 3 Camp. 8.

[1] Where, by the agreement for the sale of lands, the defendant is, on delivery of the possession, to pay part of the purchase money, the residue to be paid at future periods, and the defendant pays part, and takes possession under the agreement, the vendor cannot maintain ejectment without giving notice to quit. *Jackson ex dem Ostrander* v. *Rowan*, 9 Johns. Rep 330; see *Den* v. *M'Shane*, 1 Green's Rep. 95.

An occupant, under an executory contract, is a *quasi* tenant at will; and though he could not be evicted without a previous demand of the possession, he is not entitled to six months' notice to quit. *Venuble* v. *M'Donald*, 4 Dana's Rep. 337; *Den* v. *Webster*, 10 Yerger's Rep. 513.

Notice to quit is necessary, before the landlord can bring ejectment against his tenant from year to year, or at will, unless some act has been done which determines the tenancy; and so, generally, whenever the tenant enters into possession with the assent of the landlord, no definite period being fixed for the continuance of the possession. *Jackson ex dem. Church* v. *Miller*, 7 Cow. Rep. 747.

The grantor of a small lot of land remained in possession of the premises conveyed for twenty-seven years, and no entry or act of ownership on the part of the grantee was shown; it was held, that such possession was not adverse; that nothing but a clear and unequivocal and notorious disclaimer, of the title of the grantee, could render the possession, however long continued, adverse. It was further held, that the defendant was not entitled to notice to quit; that the relation of landlord and tenant did not subsist between the grantor and those claiming under the grantee; the more especially, as the nature and situation of the property repelled the presumption of a hiring of the premises by the grantor. *Jackson ex dem. Bowen* v. *Burton*, 1 Wen. Rep. 341.

Landlord enters into an agreement with tenant, on 2d January, 1815, to grant the latter a lease for eight years, of certain premises, the agreement to take effect from the 10th October, 1814, from which time tenant had been in possession, yielding 2*s*. 6*d*. yearly, and in case he held over after the term, he was to pay 10*s*. per diem, for every day he retained possession. The lease was never granted. At the expiration of the term, tenant held over after having been served with a nine months' notice to quit at the end of the year for which he held, which should first happen after the expiration of half a year from the date of the notice. He was then served with a written demand of possession, and the same paper notified to him, that if he did not yield quiet possession, an ejectment would be brought: held, 1, that the tenant was not to be tried as a tenant from year to year; and, 2, that the demand of possession was sufficient notice within 1 Geo. 4, c. 37, so as to entitle the plaintiff to the benefit of the undertaking, and security required by that statute. *Doe ex dem. Marquis of Anglesey* v. *Roe*, 2 Dowl. & Ryl. Rep. 565.

Where an agreement was made between A. and B. that the former should sell certain premises to B., if it turned out that he had a title to them, and that B. should have the possession from the date of that agreement; held, that an ejectment could not be maintained by A against B. without a demand of possession, although the object of the action was to try the title to the premises. *Doe ex dem. Newby* v. *Jackson*, 1 Barn. & Cress. Rep. 448.

lease,(*a*) or under a lease or agreement for a lease which is void,(*b*) or as *the minister of a dissenting congregation,(*c*) or where, having been tenant for a term which has expired, he continues in possession negotiating for a new one.(*d*) In all these, and the like cases, it is holden that the party, being lawfully in possession, cannot be ejected until such lawful possession is determined, either by demand of possession, breaking off the treaty, or otherwise,(*e*) and the party is called a tenant at will;[1] but

(*a*) *Goodtitle d. Galloway* v. *Herbert*, 4 T. R. 680; *Doe d. Warner* v. *Browne*, 8 East, 165; *Doe d. Newby* v. *Jackson*, 1 B. & C. 448.

(*b*) *Doe d. Hollingsworth* v. *Stennett*, 2 Esp. 717.

(*c*) *Doe d. Nicholl* v. *M'Keay*, 10 B. & C. 721; *Doe d. Jones* v. *Jones*, 10 B. & C. 718.

(*d*) *Denn d. Brune* v. *Rawlins*, 10 East, 261; *Doe d, Foley* v. *Wilson*, 11 East, 56; *Doe d Thomas* v. *Chamberlayne*, 5 Mee. & W. 14.

(*e*) *Roe d. Blair* v. *Street*, 4 Nev. & M. 42; *Daniels* v. *Davidson*, 16 Vez. Jun. 252; *Doe d. Price* v. *Price*, 9 Bing. 356; *Doe d. Bennett* v. *Turner*, 7 M. & W. 226; 9 M. & W. 643; *Doe d. Burgess* v. *Thomson*, 1 Nev. & P. 215; *Doe d. Rogers* v. *Pullen*, 2 Bing. N. C., 749.

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[1] A tenancy at will is held to be a tenancy from year to year, merely for the purpose of a notice to quit. *Bradley* v. *Coval*, 4 Cow. Rep. 349. A shorter notice (*e. g.* three months) will terminate the tenancy; but, in such case, where the holding is at a stated rent, the notice turns the tenancy at will into a tenancy from year to year, running from the expiration of the first notice; and imposes the necessity of giving a notice to quit of six months, terminating at a day in the year corresponding with the termination of the first notice, in order to warrant an ejectment: and the holding over upon the tenancy from year to year is at the former rent. Ib. Where a tenant holds over after such notice, without any new stipulation, the law implies an agreement that it should be at the former rent. Ib.

A rector, in December, 1816, granted, bargained, sold, and demised the rectory and all the glebe lands, tithes, &c., to a trustee for securing an annuity for a term of years, if he, the rector, should so long live. This conveyance having been made after the passing of the 43 G. 3, c. 84, and before the passing of 57 G. 3, c. 99, was held to be a valid conveyance, and to pass the legal estate to the trustee.

The rector succeeded to the rectory, upon the death of the former incumbent, in April, 1816. A. and B. were then in the possession of the glebe lands, having been tenants of the former incumbent, and they continued in possession till after December, 1816, when the rector conveyed them to the trustee for securing the annuity: held, that the latter could not maintain an ejectment against A. & B. without giving them a notice to quit. *Doe dem. Cates et al.* v. *Somerville*, 6 Barn. & Cress. Rep. 126.

See *Rising* v. *Steward*, 17 Mass. Rep. 282; *Keary* v. *Goodwin*, 16 Ib., 1; *Ellis* v. *Paige*, 1 Pick. 43; *Coffin* v. *Lunt*, 2 Pick. 70; *Phillips* v. *Covert*, 7 Johns. 1.

The New York Revised Statutes, part 2, ch. 1, tit. 4, secs. 7, 8, and 9, (vol. 1, p. 745,) require notice to be given to tenants who hold over after the expiration of their terms.

Sec. 7. "Wherever there is a tenancy at will, or by sufferance created, by the tenant's holding over his term, or otherwise, the same may be terminated by the landlord's giving one month's notice, in writing, to the tenant, requiring him to remove therefrom.

Sec. 8. "Such notice shall be served by delivering the same to such tenant, or to some person of proper age, residing on the premises; or, if the tenant cannot be found, and there

in any of these cases if the landlord receive rent whilst the party is so in possession, or do any other act amounting to an acknowledgment of a subsisting tenancy, a tenancy from year to year will be created thereby.(*a*)[1]

[*108] It is singular that we do not find in the old *authorities any decisions relative to notices to quit, although the practice of giving them has been so long established; but during the last century they have become objects of considerable attention to our Courts, and there is now no difficulty in reducing their requisites to a clear and satisfactory system.

In considering the uses and requisites of the notice to quit, our first inquiry will be directed to those particular cases in which implied tenancies from year to year are created, although the direct relationship of landlord and tenant does not exist; we shall then consider by whom, and to whom, the notice should be given; then proceed to the form of the notice, and the particular times required in certain cases for its expiration; *and, lastly, point out the means by which the notice may be waived.

(*a*) *Doe d. Rigge* v. *Bell*, 5 T. R. 471; *Clayton* v. *Blakey*, 8 T. R. 3; *Thunder d. Weaver* v. *Belcher*, 3 East, 449, 451; *Doe d. Warner* v. *Browne*, 8 East, 165.

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be no such person residing on the premises, such notice may be served by affixing the same on a conspicuous part of the premises, where it may be conveniently read.

Sec. 9. "At the expiration of one month from the service of such notice, the landlord may re-enter, or maintain ejectment, or proceed in the manner prescribed by law, to remove such tenant, without any further or other notice to quit."

The revised statutes of Mass. (ch. 60, sec. 26,) provide that, all estates at will may be determined by either party, by three months' notice, in writing, for that purpose, given to the other party; and when the rent reserved in such lease is payable at periods of less than three months, the time of such notice shall be sufficient if it be equal to the interval between the days of payment; and, in all cases of neglect or refusal to pay the rent due on a lease at will, fourteen days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease.

[1] A lessee who has taken possession of more land than he was entitled to by his lease, and rent has been paid and received for the entire premises in his possession, becomes tenant from year to year, and the lessor cannot bring ejectment for the land not included in the lease, without showing a notice to quit. *Jackson ex dem. Livingston et al.* v. *Wilsey et al.*, 9 Johns. Rep. 267.

B. entered into possession, under an agreement for a conveyance, when the whole of the purchase money should be paid, and, in the meantime, to pay an annual rent of twenty-five bushels of wheat; B. having paid rent for one year at least, becomes a tenant, and is entitled to notice to quit. *Jackson ex dem. Livingston* v. *Niven*, 10 Johns. Rep. 335.

It has been already observed that the positions of mortgagor and mortgagee are not exactly defined as far as regards their relation as landlord and tenant;(*a*) but it is settled law that the mortgagor is not in the position of a yearly tenant to his mortgagee, and a mortgagee may maintain ejectment against him, after the forfeiture of the mortgage, without any previous notice to quit, or demand of possession.(*b*)[1] The under lessees of the mortgagor may also be ejected in like manner, provided they have been let into possession by the mortgagor, subsequently to the mortgage, and without the privity of the mortgagee; and it is immaterial whether they hold as tenants from

(*a*) *Ante*, p. 42.
(*b*) *Doe d. Fisher* v. *Giles*, 5 Bing. 421; S. C., 2 M. & P. 749.

[1] A mortgagor is entitled to notice to quit (of six months) previous to bringing an action of ejectment by the mortgagee. *Jackson ex dem. Benton* v. *Loughead*, 2 Johns. Rep. 75. (Same point,) *Jackson ex dem. Carr* v. *Green*, 4 Johns. Rep. 186.

But a purchaser from the mortgagor is not entitled to notice, for the relationship of landlord and tenant does not exist between him and the mortgagee. *Jackson ex dem. Simmons* v. *Chase*, 2 Johns. Rep. 84. (Same point,) *Jackson ex dem. Ferris* v. *Fuller*, 4 Johns. Rep. 215.

Where a mortgage contains a power of sale, on default of payment, and the mortgagee proceeds under the power, and gives public notice of the sale of the mortgaged premises, for six successive months, pursuant to the statute, this, in an ejectment, afterwards brought against the mortgagor, will be deemed equivalent to six months' notice to quit, previous to the commencement of the suit; *Jackson ex dem. Bennet* v. *Lamson*, 17 Johns. Rep. 300.

Though a mortgagor, in possession, is entitled to a notice to quit, before an action brought; yet, if he sell the premises absolutely, the purchaser is not entitled to notice to quit; *Jackson ex dem. Barclay et al.* v. *Hopkins*, 18 Johns. Rep. 487. Offering to show that a mortgage had been paid off and satisfied, is not a waiver of notice to quit. Ib. An assignment of the mortgage by the mortgagee does not destroy the privity of the estate, or change the condition of the mortgagor's tenancy. Ib.

It has been held in Vermont, that the mortgagee may bring ejectment without notice to quit, either against the mortgagor or his assignee; *Wilson* v. *Hooper*, 13 Vermont Rep. 653; per *Collamer*, *J.*, *citing Lyman* v. *Mower*, 6 Vermont Rep. 345; so, also, in North Carolina, *Fuller* v. *Wadsworth*, 2 Iredell's Rep. 263; *Williams* v. *Bennett*, 4 Iredell, 122.

A delay of more than four years to bring ejectment, after notice to quit by a mortgagee to a mortgagor, is not a waiver of the notice. *Jackson ex dem. Beach* v. *Stafford*, 2 Cow. Rep. 547.

The notice to quit, by a mortgagee to a mortgagor, need not direct the mortgagor to quit on a day in the year corresponding with the date of the mortgage. Ib.

The mortgagor, in order to warrant an ejectment against him, is not entitled to notice to quit, after foreclosure. At any rate, the advertisement of sale operates as a sufficient notice to quit. *Jackson ex dem. Walsh* v. *Colden*, 4 Cow. Rep. 266.

year to year, or by leases executed after the date of the mortgage.[1] With respect to tenancies created prior to the mortgage, the situation of the mortgagee is of course the same as that of the mortgagor before the mortgage was made.(*a*)

If the mortgagor makes a lease subsequent to the mortgage, and the mortgagee consent to receive the lessee as his tenant, he will not thereby confirm the lease, but he cannot afterwards determine the tenancy without a notice to quit ;(*b*) and where a mortgage contained a singular clause that the mortgagor should pay a certain "*yearly rent*" exceeding the mortgage interest, "so long as he occupied the premises," and that it should be lawful for the mortgagee to use such remedies by distress and sale for the recovery of the *said rent* as landlords have on common demises, *provided that the reservation of such rent should not prejudice the mortgagee's right to enter and evict the mortgagor at any time after default made in payment of* **the moneys received*," it was held that this proviso operated so as to prevent the creation of a tenancy from year to year by the payment and receipt of the rent reserved, and even by a distress for the arrears.(*c*)[2]

[*109] *The assignees of the mortgagee have the like privileges with the mortgagee himself with regard to the mortgagor and his under-tenants; and the right of an assignee to maintain ejectment without a notice to quit, or demand of possession, will not be taken away by a tenancy created prior to the assignment, provided such tenancy commenced subsequently to the date of the mortgage, and continued unacknowledged by the mortgagee.(*d*)[3]

(*a*) *Warne d. Keech* v. *Hall*, Doug. 21; *Thunder d. Weaver* v. *Belcher*, 3 East, 449; *Birch* v. *Wright*, 1 T. R. 378; *Doe d. Sheppard* v. *Allen*, 3 Taunt. 78.

(*b*) *Doe d. Hughes* v. *Rising*, 8 C. & P. 566.

(*c*) *Doe d. Garrod* v. *Olley*, 12 Ad. & Ell. 485.

(*d*) *Thunder d. Weaver* v. *Belcher*, 3 East, 449.

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[1] If the tenant in possession holds under the mortgagor by lease subsequent to the mortgage, as tenant from year to year, he is not entitled to notice to quit. *Den* v. *Stockton*, 7 Halst. 322.

One who holds of a mortgagor under a parol contract to purchase, is not entitled to a notice to quit. *Jackson ex dem. Roosevelt et al.* v. *Stackhouse*, 1 Cow. Rep. 122.

[2] See *Fifty Associates* v. *Howland*, 5 Cushing, 214.

[3] To enable an assignee of a mortgage to maintain ejectment, it seems to be necessary that the assignment be recorded. *Pratt et al.* v. *Bank of Bennington*, 10 Verm. Rep. 293.

The like principle prevails with respect to claimants under writs of *elegit;* if the judgment debtor be himself in possession, or if the party in possession has been admitted tenant subsequently to the date of the judgment, (whether as a yearly tenant or under a lease) the tenant by *elegit* may maintain ejectment without a notice to quit, or demanding possession; *but if the tenant claim under a lease, or [*110] tenancy from year to year, prior in point of time to the judgment, the claimant will be barred in the last case until he has determined the tenancy by a regular notice to quit; in the first, until the determination of the lease.(*a*)

When a party has obtained possession of premises belonging to another, and the owner does any act from which a jury may infer that he intends to acknowledge him as his tenant, a tenancy from year to year is created by such act, and the party will be entitled to a regular notice to quit before he can be ejected.[1] Thus, if a landlord suffer his ten-

(*a*) *Doe d. Da Costa* v. *Wharton*, 8 T. R. 2; *Doe d. Putland* v. *Hilder*, 2 B. & A. 782.

The court of chancery, when a cause is fairly within its jurisdction, will not leave open the door for future litigation there or elsewhere; and, upon a bill by the assignee of a mortgage against the heirs and executors of the mortgagor, and the widow and heirs of the father of the mortgagor, for discovery of a deed made to mortgagor by him. The mortgage being admitted and the complainant entitled to relief against heirs of mortgagor, but the deed denied by other defendants, against whom was some proof, but not sufficient to justify a decree, the court would not make a decree for the relief of complainant against the mortgagor only, but directed an action of ejectment to be prosecuted in the Supreme Court, against the other defendants, to try the questions as to the deed. *Bowdoin Decker* v. *Mc Caskey et al.*, Saxton's Rep. 427.

[1] If the lessor allows the tenant to remain in possession seventeen years after the expiration of the lease, he cannot recover in ejectment without notice to quit. *Bedford* v. *M'Elherron*, 2 Serg. & R. Rep. 49.

The owner of the fee granted to A., his partners, fellow-adventurers, &c., free liberty to dig for tin and all other metals, through certain lands therein described, and to raise, make merchantable, and dispose of the same for her own use; and to make adits, &c., necessary for the exercise of that liberty, together with the use of all waters and water-courses, excepting to the grantor liberty for driving any new adit within the lands thereby granted, and to convey any water-course over the premises granted, *habendum* for twenty-one years; covenant by the grantee to pay one-eighth share of all ore to the grantor, and all rates, taxes, &c., and to work effectually the mines during the term, and then, in failure of the preformance of any of the covenants, a right of re-entry was reserved to the grantor: held, that this deed did not amount to a lease, but contained a mere license to dig and search for minerals, and that the grantee could not maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee. *Doe ex dem. Hanley* v. *Wood*, 2 Barn. & Ald. 724.

ant to continue in *possession after the expiration of his lease, and receive rent from him accruing subsequently to the period of such expiration, he becomes thereby his tenant from year to year upon the conditions of the original lease.(*a*) So also, if a tenant for life make a lease, void against the remainderman, and the lessee enter, and then the tenant for life die, if the remainderman receive rent from such lessee, accruing subsequently to the death of the tenant for life, such receipt of rent, although it will not amount to a confirmation of the lease, will be sufficient (unless from the inadequacy of the rent to the value of the premises, the jury should presume otherwise,)(*b*) to establish a tenancy from year to year, upon the terms of it, between the remainderman and the lessee: and it will be no answer for the re-
[*111] mainderman, *that he was ignorant of his title when he received the rent, for it is more reasonable that the remainderman, who ought to have looked into his title, should be bound by his own act, than that the lessee should be prejudiced by his ignorance.(*c*) In like manner, when a party is let into possession under a void lease, payment and receipt of rent will not establish the lease, but it will create a tenancy from year to year, regulated by its covenants and conditions.(*d*) [1] The same principle also holds if the party come into possession under an invalid agreement: as where the party held under an agreement that his landlord should not turn him out so long as the rent was duly paid, and he did not sell any article injurious to his landlord in his business, which agreement was invalid, inasmuch as it would (if the tenant complied with its terms) operate as an estate for life, which cannot be created by such an instrument, yet the tenant having been let into possession, †and rent having been paid and received, a tenancy from year to year was created.(*e*)

(*a*) *Bishop* v. *Howard*, 2 B. & C. 100.

(*b*) *Doe d. Brune* v. *Prideaux*, 10 East, 158; *Denn d. Brune* v. *Rawlins*, 10 East, 261.

(*c*) *Doe d. Jordan* v. *Ward*, 1 H. Black. 97; *Doe d. Martin* v. *Watts*, 7 T. R. 83.

(*d*) *Doe d. Rigge* v. *Bell*, 5 T. R. 471; *Clayton* v. *Blakey*, 8 T. R. 3; *Doe d. Higgs* v. *Terry*, 4 Ad. & Ell. 274; *Doe d. Hobbs* v. *Cockell*, Ibid. 478; *Doe d. Thomson* v. *Amey*, 12 Ad. & Ell. 476.

(*e*) *Doe d. Warner* v. *Browne*, 8 East, 165.

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[1] Though a parol demise for seven years be void by the statute of frauds, yet it enures as a tenancy from year to year, if the tenant enter and hold under it; and it will regulate the terms of the tenancy in other respects; as, the rent, the time of the year when the tenant must quit, &c. *Schuyler* v. *Leggett*, 2 Cow. Rep. 660. And see *Morehead* v. *Watkyns*, 5 B. Monroe Rep. 228.

The same rule prevails when a party is let into possession under a valid agreement for a future lease. As no interest in the land passes under such an agreement, *no tenancy is created thereby; but the party being let into possession, and rent being paid and received, he becomes, as in the cases already mentioned, a tenant from year to year, according to its stipulations.(a)[1] [*112]

Serious difficulties have continually presented themselves in *construing agreements of this character, from doubts arising out of the wording of each particular instrument, whether, taking the whole of it together, it was intended by the parties to operate as a present demise, or only as an agreement for a future one, and the decision upon these points are numerous and perplexing; but these nice distinctions are put an end to by the recent stat. 8 & 9 Vict. c. 106, s. 3, which enacts, that every lease required by law to be in writing, made after October 1st, 1845, shall be void at law, unless made by deed.

(a) *Doe d. Thomson* v. *Amey*, 12 Ad. & El. 476. The unsettled state of the principles and uses of the action of ejectment in the time of Lord Mansfield, is well illustrated by the decisions in the cases of *Weakley d. Yea* v. *Bucknell*, Cowp. 473, (Mich. Term, 17 Geo. III.,) and *Goodtitle d. Estwick* v. *Way*, 1 T. R. 735, (Easter Term, 27 Geo. III.) In the former case, *an agreement for a lease* was held to be tantamount to a lease; and the party making the agreement was estopped from maintaining an ejectment against the other party, although he had given him a regular notice to quit, because, "*if the Court were to say the ejectment ought to prevail, it would be merely for the sake of giving the Court of Chancery an opportunity to undo all again.*" In the latter case, a *similar agreement* was held to form no defence to an ejectment, brought by a party to whom the party making the agreement had granted a term in the premises to satisfy creditors, subsequently to the date of the agreement, although no notice to quit had been given, and the party had paid rent under the agreement; because, the conveyance being made by the lessor to a trustee for the benefit of creditors "*was not a mere voluntary conveyance,*" and, therefore, the lessor could not be considered as a trustee for the defendant, and as such restrained "*from bringing ejectment against his own* CESTUI QUE TRUST;" and the agreement for the lease, "*gave the defendant only an equitable title, which cannot be set up in a court of law against the plaintiff who has a legal title.*" Upon the sound principles by which the action is now regulated, it is evident that these two decisions should have been reversed. In both cases, the agreement for the lease, and the receipt of rent under it, would have been held to create tenancies from year to year, which would have been determined in the first case by the notice to quit, and would have continued in the latter, for want of such notice.

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[1] A contract that a person shall occupy a house, and put it in repair, and, in consideration thereof, should enjoy the property at a certain rent until repairs were reimbursed, makes such person a tenant from year to year, and not liable to ejectment when the contract is ended, without notice to quit. *Thomas* v. *Wright*, 9 Serg. & R. Rep. 87.

Where the party being already in the occupation of the land, enters into a contract for the purchase of it, pays part of the perchase-money, but fails to fulfil his contract, he is not entitled to notice to quit, before ejectment brought. *Whiteside et al.* v. *Jackson*, 1 Wen. R. 418.

Where a party enters under an agreement of this nature, and continues in possession during the period for which, by the agreement, the lease was to be granted, his tenancy ceases at the expiration of that prriod without any notice to quit, as it would have done if a lease had been executed.(*a*)

In all the cases above enumerated, the acknowledgment of the tenancy was by the payment and receipt of rent, which is indeed the ordinary evidence in cases of this nature. But the intention to
[*120] create such a tenancy, may also be inferred* from other circumstances. Thus, where, under a void lease, a money rent was reserved, and there was also a further reservation, that the tenant was to carry three cart-loads of culm annually to his landlord's dwelling-house; and he did so; and the landlord received the same; it was held, that he had thereby acknowledged the lessee as tenant from year to year.(*b*) So, where lands descended to an infant, and an ejectment was brought on his demise, and compromised upon certain terms, one of which was, that the tenant should attorn to the infant, it was ruled by Lord Kenyon, Ch. J., at *Nisi Prius*, upon a second ejectment being brought by the infant, when he attained his full age, that although he was no party to the agreement, nor had confirmed it, nor received rent since he came of age, yet that *such agreement, having been entered into without fraud or collusion, after an ejectment brought at his suit, had, by his acquiescence therein, established the defendant's title as against himself, and created a new tenancy, which could only be determined by a notice to quit.(*c*) So, also, where a *feme covert* lived many years separated from her husband, and during that time received to her separate use the rents of certain lands, which came to her by devise after separation, it was presumed, that she received the rents by her husband's authority, and held, that a notice to quit must be given by him before he could maintain ejectment.(*d*)

Where A. granted an annuity to B. out of certain lands, with the usual power of distress and entry if the annuity should be in arrear, and A. afterwards granted a lease for years to C., and the annuity fell into arrear, and B. distrained upon C., who thereupon signed an agreement "to attorn and become tenant to B.," and paid him rent; it was

(*a*) *Doe d. Tilt* v. *Stratton*, 4 Bing. 446.
(*b*) *Doe d. Tucker* v. *Morse*, 1 B. & Ad. 365.
(*c*) *Doe d. Miller* v. *Noden*, 2 Esp. 528.
(*d*) *Doe d. Leicester* v. *Biggs*, 1 Taunt. 367.

held, that this created a tenancy from year to year between B. and C., determinable on the payment of the arrears of the annuity, upon which C.'s lease for years would revive.(*a*)

It has also been held, that where a rector had suffered persons who were in possession as tenants prior to his incumbency, to continue in quiet and undisturbed possession for eight months after his institution, he must be presumed to have assented to the continuance of their tenancy under the terms of their previous holding, and therefore unable to eject them without a notice to quit;(*b*) *and [*121] although this is the only case in which a mere permission by the owner to occupy premises, without some positive act of acknowledgment, has been held sufficient *to create a tenancy requiring a regular notice to quit, the principle seems applicable to all cases where the occupant has been tenant to a previous owner, and his tenancy has expired on the determination of his landlord's estate.

But where a party has put another into possession, with a view to a future tenancy or purchase, or under circumstances of a similar nature; although he may have done no act acknowledging a regular tenancy, he cannot afterwards eject him without a demand of possession, unless some wrongful act has been done by such party determining his lawful possession.[1]

Thus, where a party was let into possession, under an agreement for the purchase of the land, and had possession formally given to him, and paid part of the purchase money, and there was no default on his part,(*c*) a demand of possession was held necessary.(*d*) So, likewise, where it was agreed that A. should sell to B. certain premises if it turned out that he had a title to them, and that B. should have imme-

(*a*) *Doe d. Chawner* v. *Bolter*, 9 Ad. & Ell. 675; 1 Nev. & P. 650.
(*b*) *Doe d. Cates* v. *Somerville*, 6 B. & C. 126; *Doe d. Kerby* v. *Carter*, 1 R. & M. 237.
(*c*) *Doe d. Parker* v. *Boulton*, 6 M. & S. 148–50.
(*d*) *Right d. Lewis* v. *Beard*, 13 East, 210.

[1] Where the vendee enters into possession, under a contract of purchase, with the consent of the vendor, an ejectment may be maintained by the vendor against the vendee, without a previous notice to quit. *Jackson ex dem. Church* v. *Miller*, 7 Cow. Rep. 747; *Smith* v. *Stewart*, 6 Johns. Rep. 46, 49; *Jackson* v. *Monerief*, 5 Wen. Rep. 26. See *Maynard's Lessee* v. *Cable*, Wright's Ohio Rep. 18.
See *Haley* v. *Hickman*, Little Sel. Cas. 266.

diate possession, A. was not permitted to maintain ejectment
[*122] *against B. without a demand of possession, although the object of the action was to try the title to the premises.(a) So, likewise, where a tenant, whose lease had expired, continued in possession, pending a treaty for a further lease, although no tenancy from year to year was created by such possession and negotiation, the landlord was thereby precluded from recovering in ejectment, upon a demise anterior to the determination of the treaty.(b) So also when a party is admitted into possession under an invalid lease or agreement, the landlord must demand possession, or in some other manner determine the will, before *he can maintain ejectment, although he has not acknowledged the party as his tenant.(c)

But where the vendor of a term, after payment of part of the purchase money, let the purchaser into possession upon an agreement, that he (the purchaser) should have possession of the premises until a given day, paying the reserved rent in the meanwhile, and that if he should not pay the residue of the purchase money on that day, he should forfeit the instalments already paid, and not be entitled to an assignment of the lease; and the purchaser failed to complete the purchase at the appointed day; it was ruled that an ejectment might be maintained without even a demand of possession, the purchaser having, by
[*123] his own *act, determined his interest in the premises.(d) And where a man, having obtained possession of a house without the landlord's privity, afterwards entered into a negotiation with him for a lease, which failed, the same rule of construction seems to have prevailed.(e) So, also, where, upon an agreement for a sale to be completed by a certain day, the intended purchaser agreed with A. to let the premises to him, to commence from that day, and A. was let into possession prior to that day by the permission of the intended seller, and the party failed to complete his purchase, A. was held not entitled to a demand of possession before ejectment brought, his possession being only the possession of that party by anticipation.(g)

(a) *Doe d. Newby* v. *Jackson*, 1 B. & C. 448.

(b) *Doe d. Hollingsworth* v. *Stennet*, 2 Esp. 716.

(c) *Goodtitle d. Herbert* v. *Galloway*, 4 T. R. 680; *Clayton* v. *Blakey*, 8 T. R. 3; *Thunder d. Weaver* v. *Belcher*, 3 East, 449, 451; *Doe d. Warner* v. *Browne*, 8 East, 165; *Hegan* v. *Johnson*, 2 Taunt. 148.

(d) *Doe d. Leeson* v. *Sayer*, 3 Camp. 8; *Doe d. Moore* v. *Lawder*, 1 Stark. 308.

(e) *Doe d. Knight* v. *Quigley*, 2 Camp. 505.

(g) *Doe d. Parker* v. *Boulton*, 6 M. & S. 148.

As the implied tenancies from year to year, which have here been treated of, depend wholly upon the presumption, that it *was the intention of the parties to create them, evidence may always be received to rebut such presumption, and show their real meaning. Thus, where a remainderman, on the death of the tenant for life, gave notice to the tenant in possession under a lease, granted by the tenant for life, but void against the remainderman, to quit at the end of six months, and subsequently to the giving of the notice, but before its expiration, received a quarter's rent, accruing after the death of the tenant for life, it was ruled by Blackstone, J., that the previous notice to quit rebutted the presumption of a *tenancy from year to year, [*124] raised by the acceptance of the rent.(*a*) So, also, where the rent is not paid and received, as between landlord and tenant, but upon some other consideration, no tenancy from year to year will be created. The payment of a customary rent for copyhold premises, has been held to be a payment of this nature; and, if the tenant hold such premises by a title or tenure, which is not supported by the custom of the manor, the receipt of the quit-rent from him by the lord will not create a tenancy from year to year.(*b*)

Upon the same principle, where a tenant in tail received an ancient rent, which was but trifling when compared with the real value of the premises, and which had been reserved under a void lease granted by the tenant for life under a power, upon a special case reserved for the opinion of the Court of King's Bench, they intimated that a jury should be strongly advised not to imply a tenancy from year to year from such payment and receipt,(*c*) although it would amount to such an acknowledgment of a tenancy at will, as would require a demand of possession before ejectment could be maintained.(*d*)

†If the tenant set his landlord at defiance, and do any act disclaiming to hold of him as tenant, as for instance, if he attorn to some other person, no notice *to quit will be necessary; for in such [*125] case the landlord may treat him as a trespasser.(*e*)[1] A reply

(*a*) *Sykes d. Murgatroyd* v. ——, cited in *Right d. Fowler* v. *Darby*, 1 T. R. 161.
(*b*) *Right d. Dean of Wells* v. *Bawden*, 3 East, 260.
(*c*) *Roe d. Brune* v. *Prideaux*, 10 East, 158.
(*d*) *Denn d. Brune* v. *Rawlins*, 10 East, 261.
(*e*) B. N. P. 96.

[1] A disclaimer by the tenant, dispenses with the necessity of a notice to quit. *Jackson*

of a tenant to a demand for rent "you are not my landlord," accompanied by a refusal to give up possession, has been held to amount to a disclaimer.(*a*) So also to a similar demand by an agent "my connection with J. C. as tenant has ceased for many years," has been held sufficient evidence of an *antecedent* disclaimer;(*b*) and where the legal estate was in trustees, and the tenant had paid rent to the *cestui que trust*, who had given notice to quit, on the receipt of which notice the tenant had said, "he did not think she would turn him out of possession, as she had promised he should continue on as tenant from year to year," the Court held, that assuming the defendant to be tenant to the trustees, there was a sufficient disclaimer to entitle them to recover without notice, and that if he was tenant to the *cestui que trust* the notice was sufficient.(*c*) But a refusal to pay rent to a devisee under a contested will, accompanied with a declaration that he (the tenant) was ready to pay the rent to any person who was entitled to receive it, was not a disavowal sufficient to dispense with the necessity of a regular notice.(*d*)[1]

This species of disclaimer is, however, limited to tenancies from year to year, a tenant for a definite number of years does not forfeit his term, by wholly refusing to pay rent, and claiming the fee as his own. Tenancies of this character can only be determined by acts *in pais* or mat-

(*a*) *Doe d. Bennett* v. *Long*, 9 C. & P. 773.
(*b*) *Doe d. Grubb* v. *Grubb*, 10 B. & C. 816.
(*c*) *Doe d. Davies* v. *Evans*, 9 M. & W. 48.
(*d*) *Doe d. Williams* v. *Pasquali*, Peake's R. 196; *vide Doe d. Calvert* v. *Frowd*, 4 Bing. 557; S. C., 1 M. & P. 480.

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ex dem. Locksell et al. v. *Wheeler*, 6 Johns. Rep. 272; *Bates* v. *Austin*, 2 A. K. Marsh. 270; *Ross* v. *Garrison*, 1 Dana, 35; *Tuttle* v. *Reynolds*, 1 Verm. 80.

See *Currier* v. *Earl*, 1 Shepl. 216; *Hall* v. *Dewey*, 10 Vermont, 593; *Tillotson* v. *Doe*, 5 Ala. 407; *Farrow* v. *Edmunson*, 4 B. Monroe, 605; *Wilson* v. *Smith*, 5 Yerger, 379; *Greeno* v. *Munson*, 9 Verm. 37; *North* v. *Barnum*, 10 Verm. 220; *Hockenbury* v. *Snyder*, 2 Watts. & Serg. 240; *Willison* v. *Watkins*, 3 Pet. 49; *Montgomery* v. *Craig*, 3 Dana, 101.

A person claiming to hold land in fee is not entitled to notice to quit. *Jackson ex dem. Whitbeck et al.* v. *Deyo*, 3 Johns. Rep. 422.

[1] Defendant, who held under a tenant for life, received on the death of tenant for life, a letter from the lessor of the plaintiff, claiming as heir, and demanding rent. Defendant answered that he held the premises as tenant to S.; that he had never considered lessor of plaintiff as his landlord; that he should be ready to pay the rent to any one who should be proved to be entitled to it, but that, without disputing the lessor of the plaintiff's pedigree, he must decline taking upon himself to decide upon his claim, without more satisfactory proof in a legal manner: held, that this was a disclaimer of lessor of plaintiff's title. *Doe ex dem. Calvert* v. *Frowd*, 4 Bing Rep. 557.

ters of record.(*a*) But when a tenant, after deserting the premises, delivered up the possession of them with the lease to a party who claimed *by a title adverse to that of the landlord, with intent to assist him in setting up that title, and not that he should hold *bona fide* under the lease, the term was held to be forfeited by the act of betraying possession.(*b*)

A disclaimer may be waived by act of the landlord acknowledging the party as his tenant, as for example, by distraining for rent.(*c*)

When a tenant from year to year dies, his interest in the land vests in his personal representative, who will continue to hold the premises upon the same terms as the original tenant, and be entitled to the same notice to quit.(*d*) If, however, by the terms of the agreement, no interest vests in the representatives, no notice to quit will be necessary. Thus where A. agreed to demise a house to B., during the joint lives of A. and B., and B. entered in pursuance of the agreement, and before any lease was executed, died, after which B.'s executor took possession of the house; it was held that A. might maintain ejectment against the executor without notice to quit, because the death of B. determined his interest, and consequently no interest vested in the executor. The Court were also of opinion that the case would have been the same if the lease had been executed.(*e*)

In like manner the situation of a tenant from year *to year [*126] remains unaltered, notwithstanding the death of the landlord, and he will be entitled to his regular notice to quit, whether the lands descend to the heir (although such heir be a minor,)(*g*) or pass to the personal representative, or devisee, of the deceased.

†We are next to consider the persons by whom, and to whom, the notice to quit is to be given.

The notice to quit must be given by the person interested in the premises, or his authorized agent; and such agent must be clothed with

(*a*) Com. Dig. tit. Forf. A. 5 ; *Doe d. Graves* v. *Wells*, 10 Ad. & Ell. 427.
(*b*) *Doe d. Ellerbrock* v. *Flyn*, 4 Tyrr. 619.
(*c*) *Doe d. David* v. *Williams*, 7 C. & R. 322.
(*d*) *Doe d. Shore* v. *Porter*, 3 T. R. 13; *Parker d. Walker* v. *Constable*, 3 Wils. 25.
(*e*) *Doe d. Bromfield* v. *Smith*, 6 East, 530.
(*g*) *Maddon d. Baker* v. *White*, 2 T. R. 159.

his power to give the notice, at the time when the notice is given; a subsequent assent on the part of the landlord not being sufficient to establish, by relation, a notice given in the first instance without his authority. And this principle is founded in reason and good sense, for as the tenant is to act upon the notice at the time it is given to him, it ought to be such an one as he may act upon with security; and if an authority by relation were sufficient, the situation of the tenant must remain doubtful, until the ratification or disavowal of the principal, and he would thereby sustain a manifest injustice.

[*127] *When, also, two or more persons are interested in the premises, a notice to quit given by one, on behalf of himself and co-tenants, will be valid only as far as his own share is con-
[*128] cerned, unless he was acting at *the time under the authority of the other parties mentioned in the notice. But this rule does not hold when the parties are interested as joint tenants; because of the rule of law, that every act of one joint tenant, which is for the benefit of his co-joint tenant, shall bind him, and it must be predicated that the determination of the tenancy by such notice is for the benefit of the estate. And where several tenants in common are interested, as many of them as give notices may recover their respective shares, although the others do not join, unless, indeed, by the conditions of the tenancy, it is rendered necessary for all the parties to concur in the notice, in which case a notice given by some of the parties, without the junction or authority of their companions, will be altogether invalid.(*a*)[1]

*Where A. and B., two tenants in common, had agreed to divide their estate, and that Blackacre should belong to A.; and the occupier of Blackacre afterwards, and with knowledge of this agreement, paid his whole rent to A., and afterwards received from him a notice to quit, such notice was held sufficient for both moieties, although the deed of

(*a*) *Right d. Fisher* v. *Cuthell*, 5 East, 491; *Doe d. Lyster* v. *Goldwin*, 2 Q. B. R. 142; *Doe d. Rhodes* v. *Robinson*, 3 Bing N. C., 677; *Doe d. Mann* v. *Walters*, 10 B. & C. 626; *Doe d. Whayman* v. *Chaplin*, 3 Taunt. 120; *Doe d. Green* v. *Baker*, 8 Taunt. 241; *Alford* v. *Vickery*, 1 Car. & M. 280.

[1] One of several tenants in common, or joint tenants, may bring ejectment in behalf of all, unless the rest forbid it. *King* v. *Bullock*, 9 Dana, 41; see *M'Fadden* v. *Haley*, 2 Bay, 457; *Perry* v. *Walker*, Ib. 461; *Perry* v. *Middleton*, Ib. 462; Ib. 539; *Watson* v. *Hill*, 1 M'Cord. 161; *Taylor* v. *Perkins*, 1 A. K. Marsh. 253.

partition was not signed, because the tenant, by payment of rent to B. for the whole premises, had estopped himself from disputing his title to them.(*a*)

Where two or more persons are interested as joint tenants, and the notice to quit is given by an agent, the authority of one of the joint tenants to such agent will bind his companions, and make the notice valid against all; but if the persons be interested as parceners or tenants in common, the notice will be available only for such portions of the land, as the parties who have given authority to the agent before he delivered the notice shall be entitled to.(*b*)

(*a*) *Doe d. Pritchett* v. *Mitchell*, 1 B. & B. 11; S. C., 3 B. Moore, 229.

(*b*) *Doe d. Aislin* v. *Somerset*, 1 B. & Ad. 137; *Doe d. Kindersley* v. *Hughes*, 7 M. & W. 139.

The marginal note of the case of *Goodtitle d. King* v. *Woodward*, (3 B. & A. 689,) is as follows: "To entitle joint tenants to recover in ejectment against a tenant from year to year, the notice to quit must be signed by all the joint tenants at the time it is served; but if the notice be given by an agent, it is sufficient, if his authority be subsequently recognized; and, therefore, where such notice was given by an agent, under a written authority, which, at the time of the service of the notice, had been signed only by some of the several joint tenants, but afterwards was signed by all the others: Held, that the subsequent recognition was sufficient to give validity to the authority from the beginning, and that the notice to quit was, therefore, sufficient." To the last edition of this Treatise the following note was appended, with respect to this case: "Notwithstanding the printed report of the case of *Goodtitle d. King* v. *Woodward*, (3 B. & A., 689,) I have not altered the principle laid down in the former editions of this work; by that, an agent must be clothed with authority to give a notice to quit at the time of giving the notice, in order to render it valid. The facts of that case were shortly as follows:—A., B., C., and D. were joint tenants; E. gave the tenant in possession a written notice to quit, purporting to be given as the agent, and on the part of all the joint tenants; and, at the time of giving such notice, E. had a written authority so to do from A. and B., which authority was subsequently signed by C. and D. According to a note taken by himself of the judgment of the court, the principle upon which the notice was held sufficient was, 'that a notice to quit, given by one joint tenant, was binding upon all, because otherwise the lessee would become a joint tenant with the party giving him notice, by which he would be subject to great inconvenience, and the estate of the co-joint tenants would be prejudiced; and, therefore, the notice must be taken to be an act beneficial to the estate, and consequently binding upon all the joint tenants;' and not as stated in the printed report, that 'a notice given by an agent is sufficient, if his authority be subsequently recognised.' The report is also, I believe, incorrect in stating, 'that, to entitle joint tenants to recover in ejectment against a tenant from year to year, the notice to quit must be signed by all the joint tenants at the time it is received;' the reverse of this proposition was, according to my note, maintained, viz., 'that a notice signed by one joint tenant was binding upon all,' and, indeed, such must have been the decision, if I have taken a correct view of the principle of the judgment. Without inquiring into the soundness of that principle, or whether it would not have been wiser to have placed joint tenants, parceners, and tenants in common, on the same footing with respect to notices to quit, there can be no doubt it is the only principle upon which that judgment can be supported with

*An agent to receive rents and let, has authority to determine a tenancy."(a)

[*129] †The steward of a corporation may give a notice to *quit without a power under the corporation seal for so doing; and if the corporation afterwards bring an ejectment upon such notice, it will not be necessary to give any other evidence of his authority, than that he is steward; for the corporation, by bringing the ejectment, show that they authorized, and adopt the act of their officer.(b)

A receiver appointed by the Court of Chancery, with a power to let the lands, is an agent sufficiently authorized to give a notice to quit; for if he have an authority to let, he must be taken to have a power of determining the letting, as he must determine for how long he will let.(c)

Where a lease contained a proviso, that if either of the parties should be desirous to determine it in seven or fourteen years, it should be lawful for either of them, *his executors, or administrators*, so to do upon twelve months' notice to the other of them, *his heirs, executors, or administrators*, it was considered that the words *executors or administrators*, were put for *representatives in general*, and that a notice might be given by *an assignee* of either party, or by *the heir or devisee*, as well as by the parties themselves, their executors, or administrators; because, otherwise, in case of an assignment or devise, the right of determining the term would be taken from the persons interested in it, and
[*130] given to a mere stranger, *having no interest therein.(d) But, where the demise was for twenty-one years, if both parties should so long live, but if either should die before the end of the term,

good faith to the tenant; because, if, after the delivery of the notice, an option remained to the parties who had not then signed the authority to confirm or disallow it, (as assumed in the printed report,) the tenant had not 'such a notice as he could act upon with certainty at the time it was given,' to which all the authorities say he is entitled; but such certainty commenced only from the time of the recognition of the authority of the agent by those parties, which might have been only the day before the notice expired. And, as an option to recognise includes of necessity a right to disallow, how can a tenant possibly regulate his conduct as to the management of his farm, &c., if it may be doubtful, until the very day on which his notice expires, whether he will be permitted to go or compelled to stay ?"

The more recent decisions have confirmed the correctness of this view of the case.

(a) *Doe d. Lord Manners* v. *Mizem*, 2 M. & R. 56.

(b) *Roe d. Dean of Rochester* v. *Pierce*, 2 Campb. 96.

(c) *Wilkinson* v. *Colley*, Burr. 2694; *Doe d. Marsack* v. *Read*, 12 East, 57, 61.

(d) *Roe d. Bamford* v. *Hayley*, 12 East, 464.

then the heirs and executors, &c., *of the party so dying*, might determine the lease by giving twelve months' notice to quit, it was holden, *that this power extended only to the representative *of the party dying*, and that the lease could not be determined by a notice to quit given by the lessor, after the lessee's death, to his representative.(*a*)

When the relation of landlord and tenant subsists, difficulties can seldom occur as to the party upon whom the notice should be served. The service should invariably be upon the tenant of the party serving the notice, notwithstanding a part, or even the whole of the premises, may have been under-let by him.[1] And in a case where the service was upon a relation of the under-tenant *upon the premises*, Lord Ellenborough, C. J., ruled the service to be insufficient, although the notice was *addressed* to the original tenant.(*b*) The original tenant is also liable to an ejectment, at the expiration of the notice, for the lands in the possession of his under-tenants, although he may, on his part, have given proper notices to them, and delivered up such parts of the premises as were under his own control.(*c*)

*Where a tenant from year to year had under-let part of [*131] the premises, and then gave up to his landlord the part remaining in his own possession, not having received from him a notice to quit, or surrendering such part in the name of the whole, it was held that a notice to quit, from the original landlord to the sub-lessee, for the part so under-let, was irregular; and that the notice should be given to the sub-lessee, by his immediate landlord, or by the original landlord to the sub-lessee.

When the premises are in the possession of two or more, as joint tenants, or tenants in common, a written notice to quit, †addressed to all, and served upon one only, will be a good notice;(*d*) so also a parol notice, given to one co-tenant only, will bind his fellow.(*e*)

(*a*) *Legg d. Scott* v. *Benion*, Willes, 44.
(*b*) *Doe d. Mitchell* v. *Levi*, M. T. 1811, MS.
(*c*) *Roe* v. *Wiggs*, 2 N. R. 330; *Pleasant d. Hayton* v. *Benson*, 14 East, 234.
(*d*) *Doe d. Lord Bradford* v. *Watkins*, 7 East, 551.
(*e*) *Doe d. Lord Macartney* v. *Crick*, 5 Esp. 196.

[1] Notice to quit, given by the lessor to his immediate lessee, who has continued to pay him his annual rent, is sufficient, though another person is in possession of the premises. *Jackson ex dem. Livingston* v. *Baker*, 10 Johns. Rep. 270.

When a corporation aggregate is the tenant, the notice should be addressed to the corporation, and served upon its officers, and a notice addressed to the officers will not be sufficient.(*a*)

In a case where A. appeared and entered into a consent rule for part of the premises as tenant, and B. appeared and entered into a separate consent rule for the whole premises, that is to say, as landlord for the part in the possesssion of A., and as tenant for the residue, and it appeared that B. had been let into possession by C., (who had come into possession under a contract of sale which had not been carrried into execution,) and had underlet part of the premises to A., and the lessor failed to prove service of a notice to quit on C. or A., but proved a service on B., the Court held that the verdict was rightly entered for the plaintiff for all the premises; and it is doubtful, from the words of the judgment, whether the Court did not consider the plaintiff entitled to take out execution for the premises in the possession of A., as well as those in the possession of D.(*b*)

*When a tenant from year to year died, and a notice was served upon the widow, who remained in possession, and no proof was given that there was any personal representative of the testator, the notice was held sufficient.(*c*)

[*132] With respect to the mode of serving the notice, it is in all cases advisable, if possible, to deliver it *to the tenant personally; but if personal service cannot be effected, the service will be sufficient if the notice be left with the wife or servant of the tenant at his usual place of residence, whether upon the demised pre-

(*a*) *Doe d. Lord Carlisle* v. *Woodman*, 8 East, 228.

(*b*) *Roe d. Blair* v. *Street*, 2 Ad. & Ell. 332. The report of this case is very unsatisfactory; and may lead to conclusions respecting notices to quit, not warranted by the general rules by which they are governed. I conceive that the relation of landlord and tenant had never been constituted between the lessor and C., (*vide ante*, p. 83;) and, consequently, that no notice to quit was necessary to be given, either to C., or to B., whom C. had no right to admit, or to A. to whom B., (being so admitted without right,) had underlet; and that a simple determination of the tenancy at will by demand of possession was all that was required, and that the Court held the will to be sufficiently determined by demand of possession upon the *actual* occupier, B., and as there was no privity between A. and C., (B. having been let into the *whole* of the premises by C., and A. having taken part as tenant to B.,) the notice to B., determined the will as to the whole premises, and gave the lessor the right to recover the *whole*.

(*c*) *Doe d. Mears* v. *Perrott*, 4 C. & P. 230.

mises or elsewhere, and its nature and contents explained at the time, (*a*) or in whatever other manner it may be served, if it can be shown that it came to the tenant's hands, before the six months previous to the expiration of his year of holding.(*b*) But a mere leaving of the notice at the tenant's house, without proof that it was delivered to some member of the household, will not be a sufficient service.(*c*)

Next of the form of the notice.(*d*)

When the landlord intends to enforce his claim to double value if the tenant holds over,(*e*) it is necessary that the notice to quit should be in writing; but for the purposes of an ejectment, a parol notice is sufficient, unless the notice is required to be in writing by express agreement between the parties.(*g*) *It is however, nevertheless the general practice to give written notices; and it is a precaution which should always, when possible, be observed, as it prevents mistakes, and renders the evidence certain and correct. It is customary also to address the notice to the tenant in possession; and it is perhaps most prudent to adhere to this form, though if proof can be given that the notice was served personally upon him, it is thereby *ren- [*133] dered unnecessary.(*h*) And where a notice was addressed to the tenant by a wrong Christian name, and the tenant did not return the notice, or object to it, and there was no tenant of the name mentioned in the notice, it was ruled at Nisi Prius to be sufficient.(*i*)

A subscribing witness to a notice to quit is unnecessary; and it is prudent not to have one, as it may occasion difficulties in the proof of the service, and cannot be of the slightest advantage to the landlord.(*k*)

(*a*) *Jones d. Griffith* v. *Marsh*, 4 T. R. 464; *Doe d. Lord Bradford* v. *Watkins*, 7 East, 553; *Doe d. Neville* v. *Dunbar*, 1 M. & M. 10; *Smith* v. *Clarke*, 9 Dow. P. C. 202.

(*b*) *Alford* v. *Vickery*, 1 Car. & M. 280.

(*c*) *Doe d. Buross* v. *Lucas*, 5 Esp. 153.

(*d*) Appendix, Nos. 1, 2, 3.

(*e*) 4 Geo. II. c. 28, s. 1.

(*g*) *Legg d. Scott* v. *Benion*, Willes, 43; *Timmins* v. *Rowlinson*, 1 Blk. 533; *Doe d. Lord Macartney* v. *Crick*, 5 Esp. 196; *Roe d. Dean of Rochester* v. *Pierce*, 2 Camp. 96.

(*h*) *Doe d. Matthewson* v. *Wrightman*, 4 Esp. 5.

(*i*) *Doe* v. *Spiller*, 6 Esp. 70.

(*k*) *Doe d. Sykes* v. *Durnford*, 2 M. & S. 62.

Care should be taken that the words of the notice are clear and decisive, without ambiguity, or giving an alternative to the tenant; for, although the Courts will reluctantly listen to objections of this nature, yet, if the notice be really ambiguous, or optional, it will be sufficient to render it ineffectual, as far at least as the action of ejectment is concerned.(*a*)

The notice, however, will not be invalid, unless it contain a real and *bona fide* option, and not merely an apparent one; for, if it appear clearly, from the words of the notice, that the landlord had no other end in view than that of turning out the tenant, it will be deemed a notice sufficient to found an ejectment *upon, notwithstanding an apparent alternative. Thus, the words, "I desire you to quit the
[*134] possession, *at Lady-day next, of the premises, &c., in your possession, or *I shall insist upon double rent*," have been held to contain no alternative; because the landlord did not mean to offer a new bargain thereby, but only added the latter words as an emphatical way of enforcing the notice, and showing the tenant the legal consequences of his holding over. It was contended for the tenant, that this could not be the construction of the notice, because the statute of 4 Geo. II., c. 28, does not give double the *rent*, but double the *value*, on holding over; but, Lord Mansfield, C. J., was of opinion that the notice, notwithstanding this variance, clearly referred to the statute. It seems, however, that, if the words had been "*or else that you agree* to pay double rent," the notice would have been an alternative one.(*b*) So, also, a notice to quit, at the end of the current year, "on failure whereof I shall require you to pay me double former rent, or value, for so long as you do detain possession," has been held to be an unqualified notice, and not giving an option to the tenant.(*c*)

Where the notice was to quit "on the 25th day of March, or 6th day of April, next ensuing,"(*d*) and was delivered before new Michaelmas-day, it was held to be a good notice; as being intended to meet a holding commencing either at new or old Lady-day, and not to give an alternative.(*e*)

(*a*) *Roberts* v. *Hayward*, 3 C. & P. 432.
(*b*) *Doe d. Matthews* v. *Jackson*, Doug. 175.
(*c*) *Doe d. Lyster* v. *Goldwin*, 2 Q. B. R. 142.
(*d*) In the printed report, this date is stated to be the *eighth* day of April, which, from the reasoning in the case, cannot be correct. See also, *Doe d. Spicer* v. *Lea*, 11 East, 312.
(*e*) *Doe d. Matthewson* v. *Wrightman*, 4 Esp. 5.

Upon the same principle, the Court will not invalidate a notice, on account of an ambiguity in the wording of it, provided the intention of the notice be sufficiently certain. Thus, *an impossible year has *been rejected. The notice was given, at Michael- [*135] mas, 1795, to quit at Lady-day, *which will be* in 1795, and was accompanied, at the time of the delivery to the tenant, with a declaration, that, as he would not agree to the terms proposed for a new lease, he must quit *next* Lady-day; and, under these circumstances, the notice was considered to be sufficiently certain.(*a*) The Court also seemed to be of opinion that the notice would have been good without the accompanying declaration, the words "which will be," manifestly referring to the then next Lady-day. In like manner, where there was a misdescription of the premises in the notice, which could lead to no mistake, the house being described therein as the *Watermans'* Arms, instead of the *Bricklayers'* Arms, no sign called the Watermans' Arms being in the parish, the notice was deemed a valid one.(*b*)

So, likewise, where a farm was leased for twenty-one years, at a certain rent, consisting, as described in the lease, of *the Town Barton*, at one portion of the rent, and *the Shippin Barton*, at the residue, with a power reserved to determine the lease at the end of fourteen years, on giving a certain notice; it was held that a notice to quit "*Town Barton, &c., agreeably to the terms of the covenant*, between us, &c.," was sufficient, because the landlord must have intended to give such a notice as the lease *reserved to him the liberty of giving, and not a [*136] void notice to quit a part only, and so the notice must have been understood by the tenant.(*c*)

So, also, notice to a yearly tenant to quit the farm, &c., "situate at D., in the county of York, which you now hold under me," the premises not being situated at D. but at H., an adjoining parish, was held not to be a material variance, the †tenant not having shown that he held more than one farm, or that he was mislead by the notice.(*d*)

When a notice is given to quit at Michaelmas, or Lady-day, generally, it will not be deemed an ambiguous notice, but considered *prima facie*,

(*a*) *Doe d. Duke of Bedford* v. *Knightly*, 7 T. R. 63.
(*b*) *Doe d. Cox* v. ——, 4 Esp. 185.
(*c*) *Doe d. Rodd* v. *Archer*, 14 East, 245.
(*d*) *Doe d. Armstrong* v. *Wilkinson*, 12 Ad. & Ell. 743.

as expiring at *new* Michaelmas, or *new* Lady-day, open, however, to explanation, that *old* Michaelmas, or *old* Lady-day, was intended. And, if it appear that the customary holdings where the lands lie, are from old Michaelmas, or Lady-day, or even that, in point of fact, the tenant entered at old Michaelmas, or Lady-day, although no such custom exist, such a notice will be binding upon him.(*a*)

The notice must include all the premises held under the same demise, for, a landlord cannot determine a tenancy as to part of the things demised, and continue it as to the residue.(*b*) But, where the demise was of land and tithes, and the notice was to quit possession of "all that messuage, tenement, or dwelling-house, farm-lands, and premises, with the appurtenances, which you rent of me," it was ruled at *Nisi Prius* that this notice was sufficient to include the tithes; for, the tithes being held along with the farm, the notice must have been understood by both parties to apply to both.(*c*)

[*137] *Fourthly, Of the time when the notice should expire.

Before, however, we enter upon this subject, it may be useful to observe, that demises, which create tenancies from year to year only, are sometimes worded so as to convey to the tenant an indefeasible interest for a certain period beyond the first year, though afterwards liable to be determined by a notice to quit.

*Thus, a demise, "not for one year only, but from year to year," has been held to constitute a tenancy for two years at least, and not determinable by a notice to quit at the expiration of the first year.(*d*) So also a demise "for one year, and so on from year to year;"(*e*) but a different interpretation was given by Lord Ellenborough, at *Nisi Prius*, to a demise "for twelve months certain, and six months' notice afterwards;" and it was ruled by him that such a demise might be determined by a notice expiring at the end of the first year, on the ground that the word *certain* applied to the first twelve months, which showed that every

(*a*) *Furley d. Mayor of Canterbury* v. *Wood*, 1 Esp. 197; *Doe d. Hinde* v. *Vioce*, 2 Campb. 256; *Doe d. Hall* v. *Benson*, 4 B. & A. 588; *Doe d. Willis* v. *Perrin*, 9 C. & P. 467.

(*b*) *Doe d. Rodd* v. *Archer*, 14 East, 245.

(*c*) *Doe d. Morgan* v. *Church*, 3 Campb. 71.

(*d*) *Denn d. Jacklin* v. *Cartright*, 4 East, 31.

(*e*) *Birch* v. *Wright*, 1 T. R. 378, 80, and the cases there cited; *Johnson* v. *Huddlestone*, 4 B & C. 922.

thing *afterwards* was *uncertain*, and depended upon the notice;(*a*) and this reasoning has been subsequently confirmed by the Court of Queen's Bench.(*b*)

Where the demise was to hold for three, six, or nine years generally, without any stipulation as to the manner in which, or the party by whom, the tenancy might be determined at the end of the third, or sixth year, the tenancy was held to be determinable, at the two earlier periods, at the will of the tenant only, and *by a re- [*138] gular notice to quit; and that, as against the landlord, the demise operated as an indefeasible one for nine years.(*c*)

If the produce of the demised lands require two years to come to perfection, as if it be licorice, madder, &c., a general holding will, it seems, enure, as a tenancy, from two years to two years, and cannot be determined by a notice to quit, at the end of the first or third year.(*d*) And it was *observed by De Grey, C. J., in his judgement, that it might deserve to be considered whether, if required by the nature of the soil, or the course of husbandry, a general holding will not always enure, as a tenancy, for such period, as may be necessary to carry the land through its regular course of cultivation, instead of as a tenancy from year to year; but this doctrine seems very doubtful.

It has before been stated generally, that, by the common law, the notice necessary to be given to a tenant, is a notice for *half-a-year*, expiring at the end of the current year of his tenancy, and that a notice expiring at any other period, will not be sufficient.(*e*) This notice is frequently spoken of in the books, as *a six months' notice;* and the distinction seems to be, that when the tenancy expires, at any of the usual feasts, as Michaelmas, Christmas, Lady-day, or Midsummer, the notice must *be given prior to the corresponding feast happening in [*139] the middle of the year of the tenancy;(*g*) whilst, if it expire

(*a*) *Thompson* v. *Maberley*, 2 Camp. 573.

(*b*) *Doe d. Chadborn* v. *Green*, 9 Ad. & El. 658.

(*c*) *Denn* v. *Spurrier*, 3 B. & P. 399.

(*d*) *Roe* v. *Lees*, Black. 1171.

(*e*) *Ante*, 75.

(*g*) In a report of a MS. case in Esp. N. P. 460, it is said, that a notice given on the 30*th of September*, being the day after Michælmas-day, to quit at Lady-day following, was ruled, by Heath, J., to be a sufficient notice. Some particular circumstance, not noticed by the reporter, must, it is conceived, have occasioned Mr. J. Heath's decision, since the principle laid down in the report is in opposition to every authority upon the subject. Probably, the tenant entered at old Lady-day. *Vide*, *Right* v. *Darby*, 1 T. R. 159, *et ante*, 98.

at any other period of the year, the notice must be given six calendar months previous to such expiration.

The notice, when a tenancy commences at any of the usual feasts, may be given to quit at the end of half-a-year, or of six months from the date of the corresponding feast in the middle of the year, without stating the day when the tenant is to quit, although the intermediate time be not exactly half-a-year or six months, from feast to feast, being the usual half-yearly computation.[1] And, indeed, in a case where the notice was to *quit "on, or about the expiration of six *calendar* months from the 29th of September, (the tenancy commencing March 25,) the Court ruled the word *calendar* to be surplusage, and held the notice good.(*a*)

It was once contended, that the principle, that a notice to quit must expire at the end of the year of the tenancy, did not extend to houses as well as lands; and that in cases where houses alone were con-
[*140] cerned, *six months' notice, at any period of the year, would be sufficient; but the Court considered that the same inconvenience might arise in the one case as in the other, since the value of houses varies considerably at different periods of the year; and, therefore, held that the tenant of a house, taken by the year, was entitled to the same privileges, with respect to the notice to quit, as the occupier of land.(*b*)

The usages, with respect to notices to quit, do not extend to cases of lodgings; and recent cases have decided, that where lodgings are taken for a certain period, the tenancy terminates at the expiration of that period, without notice on either side; and that a new contract, for a similar period, is implied by law, whenever the tenant continues in

(*a*) *Howard* v. *Wemsley*, 6 Esp. 53. The marginal note in the report of this case, is incorrect.

(*b*) *Right* v. *Darby*, 1 T. R. 159; *Roe d. Brown* v. *Wilkinson*, Co. Litt. 270,(*b*), n. 1.

[1] The Revised Statutes, part 2, ch. 1, tit. 4, sec. 1, (vol. 1, p. 744,) contain the following provision relative to the city of New York:

Sec. 1. "Agreements for the occupation of lands or tenements, in the city of New York, which shall not particularly specify the duration of such occupation, shall be deemed valid until the first day of May next after the possession under such agreement shall commence; and the rent under such agreement shall be payable at the usual quarter days for the payment of rent in the said city, unless otherwise expressed in the agreement."

possession, and enters upon a fresh term, as, for a week, if taken by the week, a month, if taken by the month, and the like.

Where A. took apartments in a dwelling house, at a rent payable half-yearly, and entered and paid half-a-year's rent, and, before the expiration of the next half-year quitted possession, and, at the end of that half-year, paid a second half-year's rent, it was ruled that taking from year to year could not be inferred from the facts, but a taking for one year only, and held that no notice was necessary; Abbot, C. J., observing, "according to the ordinary practice, lodgings are not usually let, even for so long a period as a year, and we are now called upon to infer the existence of a contract continuing for two years at least, contrary to the general usage; the inference arising from these facts is, that the defendant considered himself a tenant for one year, and no longer; and, there being no evidence of any express contract, creating a tenancy for a longer period than a year, I think that such a contract, which is certainly contrary to the general usuage which prevails in letting lodgings, ought not to be enforced.(*a*)

And, in a more recent case, the rule is thus laid down by Mr. Baron Parke, "I am not aware that it has ever been decided, that, in the case of an ordinary monthly or weekly tenancy, a month's or a week's notice to quit must be given. The cases cited, are not authorities in support of the proposition.(*b*) A tenant who enters upon a fresh week may be bound to continue until the expiration of that week, or to pay the week's rent, but this is a very different thing from giving a week's notice to quit. The proposition contended for is this, that, if a tenant commences a new week, without giving notice, he is to be considered as contracting to hold, not only for that week, but also for the following week. I am of opinion, in the absence of any evidence to prove a usage to that effect, that, in point of law, a week's notice to quit is not implied as a part of the contract, in the case of an ordinary weekly taking."(*c*) Another point of importance was also ruled by Mr. Baron Parke, in this case, namely, that a weekly tenancy terminates on the †day of the week corresponding with the day of its commencement, that

(*a*) *Wilson* v. *Abbott*, 9 B. & C. 89.

(*b*) *Doe d. Parry* v. *Hazell*, 1 Esp. 94; *Roe d. Peacock* v. *Ruffin*, 6 Esp. 4; *Doe d. Campbell* v. *Scott*, 6 Bing. 362. In these cases, notices commensurate with the periods of letting had been given, and the Courts only decided that notices for longer periods were unnecessary.

(*c*) *Huffell* v. *Armstrong*, 7 C. & P. 56.

is to say, that a party entering on a Monday may quit on a Monday, —"I cannot say a week has been exceeded by holding for six days and two fractions of a day."

When the custom of the country where the premises are situated requires or allows a notice for a longer or shorter period than half-a-year, (as, for instance, the custom of London, by which a ten-
[*141] ant, under the yearly rent of 40s., is entitled to a quarter's *notice only,(*a*) the custom will be admitted by the courts;(*b*) but such custom must be strictly proved, and the witnesses must not speak to *opinion*, but *facts*.(*c*)

The parties may also by special agreement, vary the time of the duration of the notice; but the notice must, notwithstanding, where the letting is from year to year, expire with the year of the tenancy, unless the agreement also provides some other period for its expiration.(*d*) Where, however, the terms of the agreement are not intended to create a tenancy from year to year, determinable at a quarter's notice, but to empower the parties to put an end to the tenancy at other periods of the year, as well as at its termination, the courts will give effect to it. Thus, a demise for one year only, and then to continue tenant afterwards, and quit at a quarter's notice;(*e*) and a demise, where it was agreed "that the tenant was always to be subject to quit at three months' notice,"(*g*) have been held to be demises determinable at the end, although not in the middle of any quarter. But a quarterly reservation of rent is not a circumstance from which an agreement to dispense with a half-yearly notice is to be inferred; although, where the landlord accepted in such case a three months' *notice from his tenant, without expressing either his assent to, or dissent from such notice, it was ruled at *Nisi Prius* to be presumptive evidence of an agreement that three months' notice should be sufficient.(*h*)

[*142] *The notice may be given to quit upon a particular day, or in general terms at the end and expiration of the current year of the tenancy, which shall expire next after the end of one half-year

(*a*) *Tyley* v. *Seed*, Skin. 649.
(*b*) *Roe d. Brown* v. *Wilkinson*, Co. Litt. 270, 6, n. 1.
(*c*) *Roe d. Henderson* v. *Charnock*, Peake, N. P. C. 4.
(*d*) *Doe d. Pitcher* v. *Donovan*, 1 Taunt. 155.
(*e*) *Kemp* v. *Derrett*, 3 Campb. 611.
(*g*) *Shirley* v. *Newman*, 1 Esp. 266.

from the service of the notice.(*a*) The latter form should always be used when the landlord is ignorant of the period when the tenancy commenced, and is unable to serve the tenant personally; and it is also the preferable form when the commencement of the tenancy is known, as it provides against any misapprehension of the exact day when the tenant entered. If a particular day be mentioned in the notice, it must be the day of the commencement, and not of the conclusion of the tenancy; for the tenant cannot be compelled to quit whilst his right of possession continues, and this right is not determined until the year is fully completed. It must also be the *exact* day of such commencement. The next, or any subsequent day, will not be sufficient.(*b*)

The time when a tenancy from year to year commences and expires, takes its date, in the absence of all other circumstances, from the time when the tenant actually enters upon the demised premises;(*c*) but this general rule may be varied, both as to the commencement and expiration of the tenancy, either by express agreement or legal inference.

When a person is let into possession as a yearly tenant, and afterwards takes a lease of the premises *and continues to hold [*143] the land after the lease has expired, the time of the expiration *of the tenancy, created by such holding over, will be regulated by the terms of the lease, and not by the time of the original entry. Thus, if a man enters at Lady-day, continues tenant for one or more years, then accepts a lease for a certain term expiring at Michaelmas, and afterwards holds over and pays rent, the notice must be given to quit at Michaelmas, and not at Lady-day(*d*). And the rule extends to the assignees of the original lessee, and their assigns. Whatever may be the period of the year when they enter upon the demised premises, the time of the expiration of their tenancies will be the same as if the original lessee had continued in possession; and it seems immaterial whether they come into possession before or after the expiration of the lease.(*e*)

In like manner, when a remainderman receives rent from a person in possession under a lease, granted by the tenant for life, but void

(*a*) Appendix, Nos. 1, 2, 3; *Doe d. Phillips* v. *Butler*, 2 Esp. 589.
(*b*) *Doe d. Spicer* v. *Lea*, 11 East, 312.
(*c*) *Kemp* v. *Derrett*, 3 Campb. 511.
(*d*) *Doe d. Spicer* v. *Lea*, 11 East, 312.
(*e*) *Doe d. Castleton* v. *Samuel*, 5 Esp. 173.

against the remainderman, and thereby creates a tenancy from year to year, the time at which a notice to quit, given by such remainderman, must expire, will be regulated by the terms of the lease, and not by the time of the death of the tenant for life.(*a*) As, if the lease be for a certain number of years, to commence on the 5th of April, [*144] and the tenant for life die on the 30th of September, *the proper period for the expiration of the notice will be the 5th of April.

Where also there was a verbal lease to hold for seven years by which the tenant was to enter at Lady-day, and quit at Candlemas, it was held that the lease, although void as to its duration, nevertheless regulated the terms of the tenancy in other respects, and that a notice to quit must expire at Candlemas, and not at Lady-day.(*b*)

*But where a party entered upon premises under a void agreement for five years and a half, and during that period a negotiation was entered into for a term of twenty-one years "from the expiration of the present term," at an increased rent, but no lease was executed, but the party continued in possession after the expiration of the five years and a half, and paid the increased rent, it was held that the notice to quit should expire at the time of the original entry and not at the time when the tenancy which would have been created by the lease, had it been executed, would have expired. The principle of this decision seems to be, that there was not at any time an actual demise of the land, but only negotiations and unexecuted agreements; and, therefore, the case fell within the ordinary rule of construction in cases of tenancies from year to year; which rule is, that the time for giving notice to quit, is fixed and determined by the period of the original entry; though Tindal, C. J., in his judgment, seems in some measure to rely upon the fact, that the increased rent was paid from the expiration of one of the annual periods from the time of the entry, and not from the expiration of the five years and a half.(*c*)

It may be collected from these cases, that if there be a lease for years, commencing on one day, and terminating on another, as for ex-

(*a*) *Doe d. Collins* v. *Weller*, 7 T. R. 478; *Right d. Flower* v. *Darby*, 1 T. R. 159; *Roe d. Jordan* v. *Ward*, 1 H. Blk. 97, *ante*, 79.

(*b*) *Doe d. Rigge* v. *Bell*, 5 T. R. 471; *Doe d. Peacock* v. *Raffan*, 6 Esp. 4.

(*c*) *Berrey* v. *Lindley*, 3 M. & G. 514.

ample, commencing on Lady-day, and terminating at Michaelmas, a tenancy created by the landlord's receipt of rent after the expiration of the lease, will be held to commence at Michaelmas, and to require half-a-year's notice from Lady-day.

No new tenancy is created by a mere agreement between landlord and tenant for an increase of rent in the middle of the year of a tenancy: but a notice to quit given after the *receipt of the increased rent, must expire at the time when the tenant originally entered.(*a*)

When a tenant took possession in the middle of a quarter, paid rent from the time of his coming in up to the next quarter-day, (Christmas,) and then paid his *rent half-yearly at Midsummer [*145] and Christmas, it was ruled at *Nisi Prius* that the tenancy commenced from Christmas, and not from the preceding half-quarter.(*b*) But where the tenant entered in the middle of a quarter upon an agreement "to pay rent quarterly and for the half-quarter," it was left to the jury whether the party was tenant from the quarter-day, prior to the time when he entered, or from the succeeding quarter-day; and under the direction of Lord Ellenborough, Ch. J., the jury found that the tenancy commenced with the preceding quarter.(*c*)

When the demise is by parol, and in general terms to hold from feast to feast, as from Michaelmas to Michaelmas, it will be a holding from such feast according to the *new style;* unless by the custom of the country where the lands lie (which custom may be proved by parol testimony) such tenancies commence according to the *old style.*(*d*) If, however, the demise be by deed to hold from any particular feast, as "*from the feast of St. Michael's,*" &c., the holding must be taken to be according to the new style, notwithstanding the custom; and this rule prevails although the tenancy be created by a holding over after the expiration of the lease, and the original entry was according to the old style.(*e*)

(*a*) Doe d. Bedford *v.* Kendrick, Warwick Sum. Ass. 1810.—MS.

(*b*) Doe d. Holcomb *v.* Johnson, 6 Esp. 10.

(*c*) Doe d. Wadmore *v.* Selwyn, H. T. 47 Geo. III.—MS.

(*d*) Furley d. Mayor of Canterbury *v.* Wood, 1 Esp. 198; Doe d. Hall *v.* Benson, 4 B. & A. 588.

(*e*) Doe d. Spicer *v.* Lea, 11 East, 312.

Upon the same principle, a notice to quit at Michaelmas generally, *prima facie* means new Michaelmas; *but if the tenant entered at old Michaelmas, it will be construed to mean old Michaelmas.(a)

[*146]

A tenant sometimes enters upon different parts of the land, at different periods of the year, although all are contained in one demise; and the notice to quit must then be given with reference to the substantial time of entry; that is to say, with reference to the time of entry on the substantial part of the premises demised: no notice being taken of the time of entry on the other parts, which are auxiliaries only; though the tenant will be obliged to quit them at the respective times of entry thereon.(b)

This substantial time of entry, it has been contended, must be determined by the times when the rent is payable; but it is holden to depend, either upon the general custom of the country where the lands lie, or upon the relative value and importance of the different parts of the demised premises; and of these facts it is the province of the jury to determine.

As few decisions are to be found on these points, it will be useful to give a concise statement of them.

Where the letting was to hold the arable land from the 13th of February, the pasture from the 5th of April, and the meadow from the 12th of May, at a yearly rent payable at old Michaelmas and old Lady-day, the first *payment to be made at Michaelmas then next, it was held to be a tenancy from old Lady-day to old Lady-day; because the custom of most countries would have required the tenant to have quitted the arable and meadow lands on the 13th of February, and 12th of †May, without any special agreement, and a notice to quit at old Lady-day delivered before old Michaelmas was held sufficient.(c)

[*147]

Se also upon a demise of the same nature; namely, that the tenant should enter upon the arable land at Candlemas, and the house and

(a) Doe d. Hinde *v.* Vince, 2 Campb. 256.
(b) Doe d. Strickland *v.* Spence, 6 East, 120.
(c) Doe d. Dagget *v.* Snowdon, 2 Blk. 1224.

other premises at Lady-day, to which was added a proviso, that the tenant should quit the premises "*according to the time of entry as aforesaid*," it was held, that the proviso made no alteration in the tenancy, so as to require a notice six months before Candlemas, because it merely expressed what the law would otherwise have implied; that the substantial time of entry was at Lady-day, with a privilege to the tenant, on the one hand, to enter on the arable land before that period, for the purpose of preparing it; and, on the other hand, a stipulation by him when he quitted the farm to allow the same privilege to the incoming tenant; and, therefore, that a notice to quit, given six months previous to Lady-day, although less than six months before Candlemas, was sufficient.(*a*)

Where the premises contained in the demise consisted *of [*148] dwelling-houses and other buildings, used for the purpose of carrying on a manufacture, a few acres of meadow, and pasture land, and bleaching grounds, together with all watercourses, &c., and the tenant held under a written agreement for a lease, to commence as to the meadow ground, from the 25th of December then last; as to the pasture, from the 25th of March then next; and as to the houses, mills, and all the rest of the premises, from the 1st of May—the rent payable on the day of Pentecost and Martinmas: the Court held, that the substantial time of entry was the 1st of May, inasmuch as the substantial subject of the demise was the house and buildings for the purpose of the *manufacture, to which everything else in the demise was merely auxiliary.(*b*)

Where a house and thirteen acres of land were demised for eleven years, to hold the lands from the 2nd of February, and the house and other premises from the first of May, at the yearly rent of 24*l.*, payable at Michaelmas and Lady-day, the jury found the land to be the principal subject of the demise: and the plaintiff was non-suited on account of the notice to quit not having been given six months previous to the 2nd of February. The Court was afterwards moved to set aside the non-suit, on the ground that the house was the principal part of the demise (being situated near a borough;) or, at all events, that the relative value and importance of the house and lands were so nearly balanced, it was immaterial to which the notice referred; but the Court refused the rule, saying, it was *for the jury to [*149]

(*a*) Doe d. Strickland *v.* Spence, 6 East, 120.
(*b*) Doe d. Lord Bradford *v.* Watkins, 7 East, 551.

decide which was the principal, and which the accessory part of the demise.(*a*)

And where the tenant entered upon the land on the *second* of February, and the house and out-buildings on the 2nd of May, a notice to quit served on the *sixteenth* of February, requiring the tenant to quit the farm at the end of his *present* year's holding, was held a sufficient notice to determine the tenancy in the ensuing Spring, it not being shown by the tenant that the land was the principal subject of the holding.(*b*)

If a notice to quit be given by the tenant in writing and signed by him, but not expiring with the year of his tenancy, his landlord may treat such irregular notice as a surrender of the tenancy,(*c*) and by a parity of reasoning, if a similar irregular *notice be given by the landlord, it must authorize the tenant to give up the farm.

Lastly, of the acts by which a regular notice to quit may be waived.

The acceptance of rent, accruing subsequently to the expiration of the notice, is the most usual means by which a waiver of it is occasioned; but the acceptance of such rent is not of itself a waiver of the notice, but matter of evidence only to be left to the jury, to determine with what views and under what circumstances the rent is paid and received.[1]

If the money be taken *nomine pœnæ*, as a compensation for the trespass, or with an express declaration that the notice is not thereby intended to be waived, or if there be any fraud or contrivance on the part of the tenant in paying it, or if the payment be accompanied by other circumstances which may induce an opinion that the landlord did not intend to continue the tenancy, no waiver will be produced by the acceptance. The rent must be paid and received *as rent;* that is to say, it must be so paid and received as to satisfy the jury of an intention to continue the tenancy, or the notice will remain in force.

(*a*) Doe d. Heapy *v.* Harwood, 11 East, 498.
(*b*) Doe d. Kindersley *v.* Hughes, 7 M. & W. 139.
(*c*) Aldenburgh *v.* Peafer, 6 C. & P. 242.

[1] Collins *v.* Conty, 6 Cushing's Rep. 415.

Thus, where the landlord brought an ejectment immediately upon the expiration of the notice, and after the appearance of the tenant in the action, received from him a quarter's rent, accruing subsequently to the day when the notice expired, but nevertheless continued *his action, the Court were of opinion, (upon a motion for a new trial, after a verdict for the defendant,) that from the continuance of the suit by the landlord, after the acceptance of the rent, a fair inference might be drawn that he did not mean to waive his notice; and as that point had not been left for the consideration of the jury, (who had been directed at the trial to find for the defendant, upon the simple fact of the quarter's rent having been paid and received,) the motion for the new trial was *granted.(*a*) So, also, where the rent was usually paid at a banker's, and the banker, in the common routine of business, received a quarter's rent from the tenant after the expiration of the notice, no waiver of the notice was thereby created.(*b*) But where the notice expired at Michaelmas, 1792, and the landlord accepted rent due at Lady-day, 1793, and did not bring his ejectment until after such acceptance, nor try the cause until 1795, the jury held that the notice was waived.(*c*) [*150]

The notice may also be waived by other acts of the landlord; but they are all open to explanation, and the particular act will, or will not, be a waiver of the notice, according to the circumstances which attend it. Thus, a second notice to quit, given after the expiration of the first notice, but also after the commencement of an ejectment, in which the landlord continued to proceed, notwithstanding his second notice, was holden to be no waiver of the notice originally given; because it was impossible for the tenant *to suppose that the landlord meant to waive a notice upon the foundation of which he was proceeding to turn him out of his farm.(*d*)[1] Where, [*151]

(*a*) Doe d. Cheny *v.* Batten, Cowp. 243.

(*b*) Doe d. Ash *v.* Calvert, 2 Campb. 387.

(*c*) Goodright d. Charter v. Cordwent, 6 T. R. 219.

(*d*) Doe d. Williams *v.* Humphreys, 2 East, 236; *et vide*, Messenger *v.* Armstrong, 1 T. R. 53.

[1] After verdict against a tenant for not quitting pursuant to notice, a subsequent distress by the landlord, for rent due after the verdict, does not waive the notice to quit; nor is it any ground for setting aside the verdict, or staying execution. *Doe ex dem. Holmes* v. *Darby, Clerk*, 8 Taunt. Rep. 538.

Where A., who had a lease until a day certain, having had notice to quit, held over, and ejectment was brought against him by the lessor, and pending this action he gave up the

also, after the expiration of a regular notice to quit, the landlord gave a second notice in these words:—"I do hereby desire you to quit the premises which you *now* hold of me, within fourteen days from this date, or I shall insist upon double value," it was ruled by Lord Ellenborough, C. J., at *Nisi Prius*, that the second notice could not be intended, or understood to be intended, as a waiver of the first, or even as an acknowledgment of a subsisting tenancy *at will*, having for its object merely the recovery of double value; and the lessor of the plaintiff recovered upon a demise anterior to the expiration of the *second notice.(*a*) So, also, where a notice was given "to quit the premises *which you hold under me*, your term therein having long since expired," the Court considered the paper as a mere demand of possession, and not as a recognition of a subsisting tenancy.(*b*)

But where the defendant was lessee by assignment of certain tithes, under an agreement which only operated to create a tenancy from year to year, and the impropriator, in March, 1810, (some days after the assignment,) gave the original lessee a notice to quit at the Michaelmas following, and afterwards, in March, 1811, gave the assignee [*152] a notice to quit at the then next Michaelmas, the Court *were clearly of opinion, that such second notice was a waiver as to the assignee of the former notice given to the original lessee. And, in answer to an argument in support of the efficacy of the first notice, that the original tenancy having expired at Michaelmas, 1810, could not be set up again by another notice to the defendant in 1811, inasmuch as the giving of a person notice to quit does not operate to create a tenancy in him, the Court observed, "It does not necessarily do so, but it is generally considered as an acknowledgment of a subsisting tenancy; and if the party obeys the notice, how can he be deemed a trespasser on account of a prior notice to another person? Nothing appears to show that the defendant had knowledge of any other notice to quit than the one which was served upon him;" and Bayley, J.,

(*a*) Doe d. Digby *v.* Steel, MS., and 3 Campb. 115.
(*b*) Doe d. Godsell *v.* Inglis, 3 Taunt. 54.

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possession, and then the lessor sued him and recovered a certain sum for his use and occupation of the premises during the time he held over. Held, that this was not a waiver of the notice. *Stedman* v. *McIntyre*. 5 Iredell's Rep. 571.

A parol disclaimer of the landlord's title by the tenant, does not work a forfeiture of a written lease for a term of years. *De Lancey* v. *Ganun*, 12 Barb. Rep. 120. But it is sufficient to excuse the landlord from necessity of regular formal demand of the rent. Ib.

added, "the second notice gives the defendant to understand, that if he quits at Michaelmas, 1811, he will not be deemed a trespasser.(*a*)

It may be collected from this case, that if a tenant, having underlet the premises, receive from his landlord a notice to quit, and the landlord afterwards give to the under-tenant a *notice to quit, expiring at a subsequent period,(*b*) he is precluded from recovering in an ejectment against such under-tenant, upon a demise anterior to the time of the expiration of the notice so given by him to the under-tenant. And if, after the expiration of a regular notice, the landlord should give to the same tenant a second regular notice, in the usual form, to quit at the termination of the *next, or any subsequent year of the [*153] tenancy, without referring therein to any claim for double value, and without having taken any steps, in the intermediate time, to enforce the first notice, it may be doubted whether such second notice will not also amount to a waiver of the first.(*c*)

In a case where a landlord, after the delivery of a notice to quit, promised the tenant that he should not be turned out until the place was sold, and after the sale of the premises, brought an ejectment upon a demise anterior to the time of the sale; it was contended that the permission to occupy was a waiver of the antecedent notice, so far as to prevent the tenant from being considered as a trespasser by relation back to the time when the notice expired, and that the demise ought to have been laid posterior to the day when the contract for the sale was made. But the Court held, that the permission amounted only to a declaration on the part of the landlord, that until the sale of the place, he would suspend the exercise of his right under the notice, and indulge the tenant by permitting him to remain on the premises; and that it was not intended to vacate the notice, or be destructive of any of the rights which the landlord had acquired under it.(*d*)

When a regular notice to quit had been given, terminating at Michaelmas, 1835, and previous to August, 1835, the landlord agreed to permit the tenant to continue tenant for †another year, "provided he could not obtain a tenant for the farm, at the rent it appeared to him

(*a*) Doe d. Brierly *v.* Palmer, 16 East, 53.
(*b*) Ante, 192.
(*c*) *Vide* Doe d. Scott *v.* Miller, 2 C. & P. 348.
(*d*) Whiteacre d. Boult *v.* Symonds, 10 East, 13.

to be worth, by the 1st of August," and the tenant refused to allow a party who had applied for the farm to go over it; it was ruled, that it was an implied condition of the agreement, that the tenant should permit persons applying for the farm to go over it, and that having refused to do so, the agreement was at an end, and the landlord might proceed by ejectment to recover the farm immediately after Michaelmas, 1835, although no new tenant was obtained.(*a*)

The acceptance by the landlord of the double value of the premises, given by statute 4 Geo. II. c. 28, when the tenant wilfully holds over after the expiration of a written notice to quit, or the bring-
[*154] ing of an *action of debt for the same, will not be a waiver of the notice; for the double value is given as a penalty for the trespass, and not as a payment between landlord and tenant. But if, after the expiration of a notice to quit by the tenant, the landlord accept the double *rent* to which he is entitled by the statute 11 Geo. II. c. 19, it seems that he cannot afterwards proceed upon the notice to quit, for this latter statute recognizes the party by the name of tenant, which the first statute does not, and gives a right of distress for the double rent, which is a remedy applicable only to the relation of landlord and tenant.(*b*)

When after the expiration of a written notice to quit a coal mine given by the tenants, they continued for two months working out certain portions of the coal which they considered it was usual for the tenants to take on abandoning such a work, it was held to be a question for the jury to decide, whether or not the tenants in remaining for the two months intended to waive the notice, and continue the tenancy.(*c*)

In cases where the act of the landlord cannot be qualified, but must of necessity be taken as a confirmation of the tenancy, as if he distrain for rent accruing after the expiration of the notice, or recover it in an action for use and occupation, the notice will of course be waived:(*d*) but it seems that a pending action for such use and occupation will not

(*a*) Doe d. Marquis of Hertford *v.* Hunt, 1 M. & W. 690.

(*b*) Doe d. Cheney *v.* Batten, Cowp. 245; Timmins *v.* Rowlinson, Burr. 1603; Soulsby *v.* Neving, 9 East, 310; Ryal *v.* Rich, 10 East, 48.

(*c*) Jones *v.* Shears, 4 Ad. & El. 832.

(*d*) Zouch d. Ward *v.* Willingale, 1 H. Bl. 311.

be sufficient to invalidate the notice; for the landlord may only recover to the time of the expiration of the notice, although he claim rent to a later period.(*a*) And where a landlord, after a verdict in ejectment founded on a notice to quit, distrained for rent due subsequently to the expiration of the notice, and the party submitted and paid the rent, it was held to be no ground *for staying the [*155] subsequent proceedings in the ejectment; for the distress was wrongful, and might have been disputed by the tenant.(*b*)

By the common law, if a landlord distrained after the expiration of a term, though for rent accruing during its continuance, he was held to have acknowledged a subsequent tenancy; because, by the common law, no distress could be made after the determination of a demise;(*c*) but since the statute 8 Ann. c. 14, ss. 6 & 7, by which a landlord is allowed to distrain within six calendar months after the determination of a lease for life, for years, or at will, provided his own title, or interest, and the possession of the tenant, from whom such rent became due, he continuing, a distress for rent accruing at the time of the expiration of the notice to quit, if made within the six months, will be no waiver thereof. But *this statute does not apply to cases where the tenancy is terminated by the wrongful disclaimer of the tenant. In such cases a distress amounts to a waiver of the disclaimer.(*d*)

Where a tenancy from year to year subsists between the parties, an ejectment cannot be maintained on a *parol* notice to quit at a shorter period than half-a-year, or expiring at a wrong period of the tenancy, notwithstanding the assent of the tenant to such notice, unless such assent be in *writing;* because the notice being insufficient in itself to determine the tenant's interest, his assent can only make it operative as a surrender of the term; and as such surrender is not by operation of law, but an actual surrender by agreement between the parties, it is *void by the Statute of Frauds, which requires [*156] that such surrender should be by note in writing.(*e*)

(*a*) Per Buller, J., Birch *v.* Wright, 1 T. R. 378; *et vide* Roe d. Crompton *v.* Minshall, S. N. P. 650.

(*b*) Doe d. Holmes *v.* Darby, 8 Taunt. 538.

(*c*) Pennant's case, 3 Co. 64.

(*d*) Doe d. David *v.* Williams, 9 C. & P. 322.

(*e*) Doe d. Huddlestone *v.* Johnson, 1 M'Leland and Yonge, 141; Johnson *v.* Huddlestone, 4 B. & C. 922.

As the relation of landlord and tenant is mutual, the rules for the regulation of notices to quit when given by tenants are of course similar *mutatis mutandis* to those by which notices from landlords are governed.[1] They must be the same in form and substance, expire at the like periods of the year, are dependent upon like rules as to the time and mode of service, and may be waived by similar acts.

Secondly, of the termination of a tenancy by the non-payment of rent, or the non-performance of a condition or covenant.(*a*)

The right to terminate a tenancy by a notice to quit *is given by the common law, and is necessarily incidental to a tenancy from year to year:[2] the termination of a tenancy by the non-payment of rent, or the breach of a covenant or condition, arises only under express agreement, and seldom occurs but where the tenant has a written lease for a determinate period.

(*a*) As the non-payment of rent is also the non-performance of a covenant, this particular enumeration may, perhaps, be logically incorrect; but as the proceedings differ so materially in case of non-payment of rent, and of non-performance of other covenants, it has been thought most conducive to perspicuity to name them separately.

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[1] The New York Revised Statutes, part 5, chap. 1, tit. 4, § 10, (vol. 1, p. 745,) contain the following provision as to notice to quit, given by the tenant:

"§ 10. If any tenant shall give notice of his intention to quit the premises by him holden, and shall not accordingly deliver up the possession thereof, at the time in such notice specified, such tenant, his executors or administrators, shall, from thenceforward, pay to the landlord, his heirs or assigns, double the rent which he should otherwise have paid, to be levied, sued for and recovered, at the same time and in the same manner, as the single rent; and such double rent shall be continued to be paid during all the time such tenant shall continue in possession as aforesaid.

[2] In the case of *Jackson ex dem. Wood* v. *Salmon*, (4 Wen. Rep. 327,) it was shown on the trial that one Wells entered into possession of the premises in question, in March, 1824, as a tenant of the lessor of the plaintiff for one year, to work the same on shares. He held over. In May, 1825, the defendant entered under Wells, (Wells remaining in possession,) to work the land on shares, and on the fourteenth of the same month an ejectment was commenced against him. The plaintiff was nonsuited for the reason that the defendant was a mere cropper: that Wells was the real tenant, and, remaining in possession, the action should have been brought against him. A motion was made to set aside the nonsuit.

By the Court, Savage, Ch. J. "The only question in the case is, whether the defendant was entitled to notice to quit. Wells entered into possession lawfully; he hired the premises for one year, and continued in possession after that period; he was tenant from year to year, and was entitled to notice before an ejectment could be brought against him. The defendant coming in under Wells, stands in the same relation to the lessor. A tenant for a year, holding over, is tenant from year to year, and not at will; but if at will, he was entitled to notice; (4 Cow. Rep. 349.) We therefore refuse to set aside the nonsuit."

*It has already been observed,(a) that an actual entry upon the lands was formerly necessary before an ejectment could be maintained, and that the claimant's title must be of such a nature as to render his entry lawful. When, therefore, a lease for years was granted to the tenant, and the right of possession thereby transferred to him, the landlord could not legally enter upon the land during the continuance of the term; and was consequently without remedy to recover back his possession whilst the term lasted, although the tenant should neglect to render his rent, or otherwise disregard the conditions of his grant.[1] When terms for years increased in length and value, this became a serious evil to landlords. The tenant might be so indigent as to render an action of covenant upon the original lease altogether useless, and the premises might be left without a sufficient distress to countervail an arrear of rent. As a means of obviating these difficulties, it became the practice for landlords to insert in their leases a proviso declaring the lease forfeited, if the rent remained unpaid for a certain time after it became due, or if any other particular covenant of the lease were broken by the lessee, and empowering the landlord in such cases to re-enter upon, and re-occupy his lands.[2] [*157]

(a) Ante, p. 10.

[1] After articles for the sale of land, on which the vendor receives part of the purchase money in hand, and the residue to be paid in several instalments, if the times of payment have long expired, without payment by the vendee before or after the suit brought, the vendor may recover in ejectment. *Martin* v. *Willink et al.*, 7 Serg. & R. Rep. 297.

If A. purchase the right of B. to land under an application and survey, he is answerable to the commonwealth for the purchase money, and is not bound to pay until called upon; and if the representatives of B. obtain a patent, not at the request of A., nor for his benefit, but for the purpose of vesting the title in themselves, A. may recover in ejectment against them, or those claiming under them, without previously tendering the money expended in procuring the patent. *Vincent* v. *The Lessee of Huff*, 8 Serg. & R. Rep. 381.

[2] The grantee of a right of working certain mines, commenced working them, but after some time discontinued, not being prevented by the want of water, or any other inevitable accident. The grantor, after some lapse of time, verbally authorized other persons to dig for ore throughout part of the land described in the deed, and met those persons on part of the land, and pointed out the boundaries within which they were to exercise the liberty; and himself subsequently entered into a mining adventure with other persons, which was carried on within the limits described in the indenture; and afterwards in consideration of the surrender of the first grant, and of certain payments, demised the premises to a lessee for twenty-one years; and upon the execution of this lease, the original deed was delivered up, but there was no surrender in writing; held, that these acts amounted to a re-entry by the grantor, inasmuch, as unless referred to the exercise of that right they would be acts of trespass by him. *Doe ex dem. Hanley* v. *Wood*, 2 Barn. & Ald. Rep. 724.

When provisoes of this nature were first introduced, the ancient practice prevailed, and of course actual entries were then made in these as in all other cases; and it seems also to have been necessary, for some years after the modern practice *was invented, and the sealing [*158] of leases dispensed with, for landlords *to make actual entries upon the lands, before they could take advantage by ejectment of the forfeiture of a lease. This useless form is now indeed abolished; but as the right to make the entry is still necessary, the provisoes are continued to the present day in their ancient terms.(*a*)

Having thus briefly shown the principles upon which these provisoes are founded, we shall now inquire, first as to the covenants deemed by our law to be valid; secondly, as to what will amount to the breach of any particular covenant, and herein of the proceedings at common law, and under the statute 4 Geo. II. c. 28, on a clause of re-entry for non-payment of rent; and, thirdly, as to the modes by which conditions may be dispensed with, or forfeitures waived.

The landlord, having the *jus dispodendi*, may annex whatever conditions he pleases to his grant, provided they be neither contrary to the laws of the kingdom, nor to the principles of reason, or public policy; and it is by these general maxims we must be guided, when called upon to consider the validity of any particular covenant in a lease; for only one decided case upon the subject is to be found in our legal authorities.[1]

(*a*) Little *v.* Heaton, Salk. 358, S. C., Ld. Raym. 750; Goodright d. Hare *v.* Crator, Doug. 477; Anon. 1 Vent. 248; Wither v. Gibson, 3 Keb. 218.

[1] A condition in a lease not to sell or dispose or any wood or timber off of the demised premises, without permission, in writing, from the landlord, is a good and valid condition, and a breach thereof works a forfeiture of the estate. *Verplanck* v. *Wright*, 23 Wen. Rep. 506.

The Revised Statutes of New York, part, 3, ch. 8, tit. 9, art. 2, (vol. 2, pp. 505, 506, and 507,) contain the following enactments:

Sec. 30. "Whenever any half year's rent, or more, shall be in arrear from any tenant to his landlord, and no sufficient distress can be found on the premises, to satisfy the rent due, if the landlord has a subsisting right by law to re-enter for the non-payment of such rent, he may bring an action of ejectment for the recovery of the possession of the demised premises; and the service of the declaration therein shall be deemed, and stand instead of, a demand of the rent in arrear, and of a re-entry on the demised premises.

Sec. 31. "If, upon the trial of the cause, it shall be proved, or upon judgment by default, against the defendant, it shall appear to the court by affidavit, that the landlord had a right to commence such action, according to the provisions of the preceding section, the plaintiff

The lease in that case was for twenty-one years, *and the proviso, that the landlord might re-enter, if the tenant became [*159]

in such ejectment shall have judgment to recover the possession of the demised premises and his costs, and the court shall award execution therefor.

Sec. 32. "At any time before judgment in such a cause, the defendant may either tender to the landlord, or bring into the court where the suit shall be pending, all the rent in arrear at the time of such payment, and all costs and charges incurred by the lessor; and in such case, all further proceedings in the said cause shall cease.

Sec. 33. "At any time within six months after the possession of the demised premises shall have been taken by the landlord, under any execution issued upon a judgment obtained by him, in any such action of ejectment, the lessee of such demised premises, his assigns, or personal representatives, may pay or tender to the lessor, his personal representatives, or attorney, or into the court where the suit shall be pending, all the rent in arrear at the time of such payment, and all costs and charges incurred by the lessor; and, in such case, all further proceedings in the said cause shall cease, and such premises shall be restored to the lessee, who shall hold and enjoy the demised premises, without any new lease thereof, according to the terms of the original demise.

Sec. 34. "In case the said rent and arrears, and full costs, shall remain unpaid for six months after the execution issued upon any judgment in ejectment shall have been executed, the lessee and his assigns, and all other persons deriving title under the said lease, from such lessee, shall be barred and foreclosed from all relief or remedy in law or equity, (except for any error in the record or proceedings,) and the said lessor or landlord shall, from thenceforth, hold the said demised premises free and discharged from such lease or demise.

Sec. 35. "A mortgagor of such lease, or of any part thereof, who shall not be in possession of such demised premises, and who shall, within six months after such judgment obtained, and execution thereon executed, pay all rent in arrear, and all costs and charges as aforesaid, and perform all the agreements which ought to be performed by the first lessee, shall not be affected by such recovery in ejectment.

Sec. 36. "The lessee, or any person claiming any interest in such lease, may, within six months after execution executed on such judgment in ejectment, file his bill for relief in a court of equity, but not after that time; and, if relieved in such court, he shall hold and enjoy the demised premises, without any new lease thereof, according to the terms of the original demise.

Sec. 37. "In case of such bill being filed within the time aforesaid, the complainant shall not have or continue any injunction against the proceedings at law on such ejectment, unless he shall, at such time as the chancellor shall direct, bring into court such sum of money as the lessor shall, in his answer, have shown to be due and in arrear, over and above all just allowances, and also all the costs taxed in the said suit, there to remain until the hearing of the cause, or to be paid to the lessor on good security, as the court may direct.

Sec. 38. "If the lessor shall have entered into the actual possession of the demised premises, the court may direct that so much, and no more, as he shall really have made of the said premises, during his possession thereof, or as he might, without wilful neglect, have made of the said premises, be deducted from the amount of the rent in arrear to such lessor, and the costs of such ejectment; and the complainant shall be required to pay the balance before he shall be restored to the possession of the said premises."

Whenever the right of re-entry is reserved and given to a grantor or lessor, in any grant or lease, in default of a sufficiency of goods and chattels whereon to distrain for the satisfaction of any rent due, such re-entry may be made at any time after default in the payment of such rent, provided fifteen days' previous notice of such intention to re-enter, in writing, be

bankrupt. This proviso was holden valid, upon the principle, that as it is reasonable for a landlord to restrain his tenant from assigning, so it is equally reasonable for him to guard against such an event as bankruptcy, for the consequences of bankruptcy would be an assignment; and that such a proviso is not contrary to any express law, nor against reason or *public policy, for it is a proviso which cannot injure the creditors, who would not rely on the possession of the land by the occupier without a knowledge also of the interest he had therein; and to discover this they must look into the lease itself, where they would find the proviso that the tenant's interest would be forfeited in case of bankruptcy. Buller, J., in his judgment on the case, made a distinction between leases for short terms, and very long leases, with respect to provisoes of this nature; because if they were to be inserted in very long leases, it would be tying up property for a considerable length of time, and be open to the objections of creating a perpetuity; but he afterwards adds, that the principal ground of his decision was, because it was a stipulation not against law, nor repugnant to anything stated in the former part of the lease, but merely a stipulation against the act of the lessee himself, which it was competent for the lessor to make.(*a*)

[*160] Secondly, Of what will amount to the breach of *any particular covenant,[1] and herein of the proceedings at common law, and under the statute 4 Geo. II. c. 28, on a clause of re-entry for non-payment of rent.

The power generally reserved in leases to landlords, to re-enter in case the rent shall remain in arrear for a certain time after it is due, is the most common proviso upon which ejectments for forfeitures are founded, and as several provisions are made, both by the common and statute law, for regulating ejectments brought upon such provisoes, a separate consideration of the mode of proceeding upon a clause of re-

(*a*) Roe d. Hunter *v.* Galliers, 2 T. R. 133.

given by such grantor or lessor, or his heirs or assigns, to the grantee or lessee, his heirs, executors, administrators, or assigns, notwithstanding there may be a sufficiency of goods and chattels on the lands granted or demised for the satisfaction thereof. The said notice may be served personally on such grantee or lessee, or by leaving it at his dwelling-house, on the premises. N. Y. Rev. Sts., vol. 2, p. 751, sec. 10.

[1] Where a lease contains a covenant against waste, and also a clause of re-entry for a breach of covenants, if the lessee or his assigns, commit waste, the lessor may bring ejectment. Jackson ex dem. Church et al. *v.* Brownson, 7 Johns. Rep. 227.

entry for rent in arrear, seems the most perspicuous method of treating the subject.

At the time when provisoes for re-entry were first introduced, it was, unfortunately, the practice to disfigure our legal maxims *with endless subtilties and distinctions; and the preliminaries required by the common law, before a landlord can bring an ejectment upon a clause of re entry for non-payment of rent, are so numerous, as to render it next to impossible for any, unversed in the practice of the Courts, to take advantage of a proviso of this nature. "First, a demand of the rent must be made, either in person, or by an agent properly authorized.(*a*) Secondly, the demand must be of the precise rent due;(*b*) for *if he demand a penny more, or less, it will be ill. Thirdly, [*161] it must be made *precisely upon the day* when the rent is due, and payable, by the lease, to save the forfeiture; as, where the proviso is, "that if the rent shall be behind and unpaid, by the space of thirty, or any other number of days after the day of payment, it shall be lawful for the lessor to re-enter," a demand must be made on the thirtieth, or other last day. Fourthly, it must be made a convenient time before sunset.(*c*) Fifthly, it must be made upon the land, and at the most notorious place of it. Therefore, if there be a dwelling-house upon the land, the demand must be at the front or fore door, though it is not necessary to enter the house, notwithstanding the door be open; but if the tenant meet the lessor, either *on* or *off* the land, *at any time* of the last day of payment, and tender the rent, it is sufficient to save a forfeiture, for the law leans against forfeitures. Sixthly, unless a place is appointed where the rent is payable, in which case the demand must be made at such place. Seventhly, a demand of the rent must be made *in fact*, although there should be no person on the land ready to pay it."(*d*)

†Nor are these the only vexatious difficulties *to which a [*162]

(*a*) Roe d. West *v.* Davies, 7 East, 363.

(*b*) That is to say, of the precise rent due, *by the non-payment whereof the forfeiture will be incurred;* as a quarter's rent, if the rent be payable quarterly, half-a-year's rent, if payable half-yearly, and so forth; and if there be any previous arrears of rent, and the rent demanded, include such arrears, it will not be sufficient to work a forfeiture. Doe d. Wheeldon *v.* Paul, MS.; S. C., 3 C. & P. 613.

(*c*) According to the case of Doe d Wheeldon *v.* Paul, 3 C. & P. 613, the demand ought to be made at the last hour of the day, at sunset.

(*d*) 1 Saund. 287, (n. 16.)

landlord, by the common law, was subject. The Courts, notwithstanding his compliance with all the required formalities, would set aside the forfeiture, upon payment of the debt and costs, at any time before execution executed;(*a*) and the tenant might at any time apply to a Court of Equity for relief.

Where the ejectment is brought upon a clause of re-entry, and *less than six months' rent is due*, all these difficulties still exist, (unless dispensed with be the express words of the lease,)(*b*) but, by the wise provisions of the Legislature, the landlord is now relieved from the two latter inconveniences in all cases where six months' rent is in arrear; and is also exempted from an observance of the forms and niceties of the common law, if there be likewise no sufficient distress upon the premises.

By the 4 Geo. II. c. 28, s. 2, it is enacted, that, in all cases between landlord and tenant, as often as one half-year's rent shall [*163] be in arrear, and the landlord hath right by law *to re-enter for the non-payment, he may, without any formal demand or re-entry, proceed by ejectment to recover the premises, or in case a declaration cannot be served, or no tenant be in actual possession, he may affix the same upon the door of the messuage, or if no messuage, then upon some notorious place of the demised premises, and such affixing shall be deemed legal service, and stand in the stead of a demand and *re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing, it shall be made appear to the Court by affidavit, or be proved upon the trial, in case the defendant appears, that half-a-year's rent was due before the declaration was served, and that no sufficient distress was to be found on the premises, countervailing the arrears then due, and that the lessor in ejectment had power to re-enter; that then the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee shall suffer judg- [*164] ment to be recovered on such ejectment, and *execution exe-

(*a*) Roe d. West *v.* Davis, 7 East, 363, and the cases there cited.

(*b*) Doe d. Harris *v.* Masters, 2 B. & C. 490. Wood, B. in his judgment in the Exchequer Chamber, in the case of Doe d. Lord Jersey *v.* Smith, 1 B. & B. 178, intimated a strong opinion that the stat. 4 Geo. II. c. 28, put an end to all proceedings by re-entry at common law, and repeated that opinion in his judgment on the same case in the House of Lords, (2 B. & B. 554;) but his opinion was not supported by any other Judge; and many of the Judges expressed their dissent from it.

cuted thereon, without paying the rent and costs, and without filing any bill for relief in equity, within six calendar months after such execution executed; then such lessee, and all other persons claiming and deriving under the said lease, shall be barred from all relief or remedy in law or equity, other than by writ of error, for reversal of the judgment, and the landlord shall hold the premises discharged from the lease: provided that the right of any mortgagee of such lease, who shall not be in possession, shall not be barred, so as such mortgagee shall, within six calendar months after judgment and execution, pay all rent in arrear, and all costs and damages sustained by the lessor, and perform all the covenants and agreements of the lease.

By section 3, in case the said lessee shall, within the time *aforesaid, file a bill for relief in equity, he shall not have [*164] or continue any injunction, against the proceedings at law, unless he shall, within forty days next after a full answer shall be filed by the lessor of the plaintiff, bring into court such sum of money as the lessor shall, in his answer swear to be due and in arrear, over and above all just allowances, and costs, there to remain till the hearing of the cause, or to be paid out to the lessor on good security, subject to the decree of the court; and in case such bill shall be filed, within the above named time, and after execution is executed, the lessor *of the plaintiff shall be accountable only for so much, and no more, as he shall really and *bona fide* make of the demised premises from the time of their entering into possession; and if what shall be so made by the lessor happen to be less than the rent reserved, then the lessee, before he shall be restored to his possession, shall pay such lessor what the money so by them made, fell short of the reserved rent, for the time such lessor held the lands.

*The fourth section provides, that if the tenant shall, before [*166] the trial of the ejectment, pay or tender to the lessor or his attorney, or pay into the court all the rent and arrears, and costs, then all further proceedings shall cease; and if such lessee shall, upon any bill, be relieved in equity, he shall hold the demised lands, according to the lease, without any new lease being made.

Some little perplexity attends the wording of these sections, which seems upon the first reading, to extend only to cases of ejectment brought after half-a-year's rent due, where the landlord has a right to re-enter, and where no sufficient distress is to be found upon the premises;

but the statute has been held to be more general in its operation, and its provisions, (with the exception of the one which dispenses with the formalities required by the common law upon a clause of re-entry for non-payment of rent,) extend to all cases where there is six months' rent in arrear, and a right of re-entry in the landlord.(*a*)

The Legislature appear to have four different objects in view [*167] in the enactment of this statute. First, to *abolish the idle form of a demand of rent, where no sufficient distress can be found upon the premises to answer that demand; secondly, in cases of beneficial leases which may have been mortgaged, *to protect the mortgagee against the fraud or negligence of their mortgagors. Thirdly, to render the possession of the landlord secure, after he has recovered the lands; and fourthly, to take from the court the discretionary power they formerly exercised, of staying the proceedings, at any stage of them, upon payment of the rent in arrear, and costs. The first of these objects is effected by permitting the landlord to bring his ejectment without previously demanding the rent: the second, by permitting a mortgagee, not in possession, to recover back the premises at any time within six months after execution executed, by paying all the rent in arrear, damages, and costs of the lessor, and performing all the covenants of the lease:(*b*) the third, by limiting the time for the lessee, or his assigns to make an application to a court of equity for relief, to six calendar months after execution executed: and the fourth, by limiting the application of the lessee to stay proceedings, upon payment [*168] of the rent in arrear *and costs to the time anterior to the trial, and making it compulsory upon the court to grant the application when properly made.(*c*)

As this statute dispenses with a demand for rent in those cases only where there is no sufficient distress upon the premises as well as six

(*a*) Roe d. West *v.* Davis, 7 East, 363.

(*b*) It is difficult to discover from the report of the case of Doe d. Whitfield *v.* Roe, 3 Taunt. 402, what was the true point submitted to the judgment of the Court. It is quite clear it is not the one stated in the margin, viz. "that the *mortgagee* of a lease has the *same* title to relief, against an ejectment for non-payment of rent, and upon the same terms, as the *lessee* against whom the recovery is had," because by the provisions of this statute, a lessee can only have relief against an ejectment for a forfeiture, upon paying the arrears of rent and costs of suit into Court *before trial*, whereas, a mortgagee may obtain relief upon paying the arrears, costs, and damages, at any time *within six months after execution executed.*

(*c*) Roe d. West *v.* Davis, 7 East, 363.

months' rent in arrear, it is still necessary for the lessor to comply with all the formalities of the common law, before he can proceed upon a clause of re-entry for non-payment of rent, if a sufficient distress can be *found.(*a*)[1] But an insertion in the proviso of the lease, that the right of re-entry shall accrue *upon the rent being lawfully demanded*, will not render a demand necessary if there be no sufficient distress, for it is only stating in express words, that which is in substance contained, from the principles of the common law, in every proviso of this nature.(*b*)

To dispense with the demand for rent, it is also necessary that full evidence should be given that no sufficient distress was to be found upon the premises, by showing that strict search has been made in every part of them;(*c*) unless, indeed, the landlord can show that he was prevented by the tenant from entering to distrain, the words "no sufficient distress" having been ruled by Lord Tenterden to mean, "no sufficient distress which can be got at."(*d*) And where upwards of six months' rent is in arrear, the demand will not be dispensed with, if there be a sufficient distress to counteract the arrear of six months, though insufficient to meet the whole amount due.(*e*)

(*a*) Doe d. Forster *v.* Wandlass, 7 T. R. 117; Doe d. Chandless *v.* Robson, 2 C. & P. 245; Doe d. Bias *v.* Horsley, 1 Ad. & Ell. 766; *vide* Smith *v.* Spooner, 3 Taunt. 251. If the reader can comprehend the meaning of the expressions reported to have been used by the Judges in pages 251, 252, of the report of this case, he will be more fortunate than the writer of this note.

(*b*) Doe d. Schofield *v.* Alexander, 2 M. & S. 525. Lord Ellenborough, C. J., differed from the other Judges in this case, he being of opinion, that when the words, "*being lawfully demanded*," were inserted in a proviso for re-entry, they were to be considered as a stipulation between the parties that the rent should be, in fact, demanded, (though not with the strictness of the common law,) before ejectment brought.

(*c*) Rees d. Powell *v.* King, cited, 2 B. & B. 514.

(*d*) Doe d. Chippendale *v.* Dyson, 1 M. & M. 77.

(*e*) Doe d. Powell *v.* Roe, 9 Dow. P. C. 548.

[1] Tenants of a large tract of land demised to them made a partition among themselves thirty years ago, and ever since held the allotted portions in severalty; held, that the landlord not having been a party to the partition, could not proceed by action of ejectment for the recovery of one of the portions on the ground that a sufficient distress could not be found in such portion, as it appeared that in the other divisions of the tract sufficient property could be found for all the arrears of rent due. *Jackson* v. *Wyckoff*, 5 Wen. 53.

Where a lease contained a proviso that, if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no legal or formal demand should be made;" held, that rent having been in arrear for the time specified, an ejectment may be maintained without actual re-entry, and without any demand of the rent. *Doe dem. Harris* v. *Masters*, 3 Barn & Cress. Rep. 490.

It has been observed that the provisions of this statute, (with the exception of the one relating to the demand of rent,) extend to all
[*169] cases where there is six *months' rent unpaid, and *the landlord has a right to re-enter. This point has only been decided upon that part of the fourth section which directs all proceedings to be staid upon payment of the rent in arrear and costs before trial; but the principle of the decision seems to apply to all the other provisions of the statute, as well as to the one then immediately before the court. It was objected, in that case, that *the statute* only applied to cases of ejectment brought after half-a-year's rent due, where no sufficient distress was to be found upon the premises, but Lord Ellenborough, C. J., says "*the statute* is more general in its operation; for though the fourth clause has the word *such*, (such ejectment,) yet the second clause, to which it refers, is in the disjunctive; stating first, that, in all cases, between landlord and tenant, when half-a-year's rent shall be in arrear, and the landlord has a right of re-entry for non-payment thereof, he may bring ejectment, &c., *or* in case the same cannot be legally reserved, &c., *or* in case such ejectment shall not be for the recovery of any messuage, &c., and, in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall appear by affidavit, or be proved upon the trial, in case the defendant appears, that half-a-year's rent was due before the declaration served, and that no sufficient distress was to be found on the premises, and that the lessor had power to re-enter; *then, and in every such case*, the lessor in ejectment shall recover judgment and execution."(*a*)

[*170] By the words of the fourth section, the lessee is to *pay the arrears of rent, &c., into Court *before the trial;* and no provision is expressly made for his relief in case he should suffer judgment to go by default against the casual ejector; but the Courts do not consider a judgment so obtained as equivalent to a trial, but will grant relief to the lessee at any time before execution executed.(*b*)

†The provision of this fourth section seems also to extend only to cases where the rent and costs are tendered to the lessor, or paid into Court after action brought; yet where the tenant tendered the rent in arrear after the lessor had given instructions to his attorney to com-

(*a*) Roe d. West *v.* Davis, 7 East, 363.

(*b*) Goodtitle *v.* Holdfast, Stran. 900; Doe d. Harris *v.* Masters, 2 B. & C. 490; *Vide* Doe d. Marquis of Westminster *v.* Suffield, 5 Dow. P. C. 660.

mence an action, but before the declaration had been delivered, the Court set aside the proceedings with costs, although it was urged by the lessor that such tender was merely matter of defence at the trial.(*a*)

Where the ejectment was brought on a clause of re-entry in the lease for not repairing, as well as for rent in arrear under the statute, it was argued, on a motion to stay proceedings upon payment of the rent, that the case was not within the act, because it was not an ejectment founded singly on the non-payment of rent; but the Court, notwithstanding, made the rule absolute, with liberty for the lessor to proceed on any other title.(*b*) But where the lessor has recovered possession of the premises, a Court of *Equity will not grant relief [*171] under the second section, if such recovery was by reason of the breach of other covenants or conditions, as well as by the non-payment of rent. And where the tenant applied to the Court of Chancery to relieve against a recovery upon a judgment by default against the casual ejector, alleging that the ejectment was brought for a forfeiture incurred by non-payment of rent, which allegation was contradicted by the landlord, who stated in his answer, that the tenant had also broken many of the covenants of the lease, for which the landlord had a right to re-enter;[1] the Court directed an issue to try, whether the

(*a*) Goodright d. Stephenson *v.* Noright, Black. 746.
(*b*) Pure d. Withers *v.* Sturdy, B. N. P. 97.

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[1] Where, at the bottom of a lease containing a clause of re-entry for non-performance of covenants, conditions, &c., the lessee agreed not to make any alterations in the buildings without the consent of the lessor: held, that this rested merely in covenant, and was not a condition for the breach of which the lease to be forfeited. *Jackson ex dem. Welden* v. *Harrison*, 17 Johns. Rep. 66.

A covenant or condition in a lease to a person, his heirs and assigns for ever, yielding and paying a certain yearly rent, &c., that in case the lessee or his heirs, &c., should be minded to dispose of the premises, or any part thereof, he should give to the lessor, or his heirs, &c., the right of pre-emption or refusal of buying, and would not sell, without his leave, under his hand and seal first obtained; and that on every such sale, with such license, he should pay to the lessor, one-tenth of the purchase money for which the premises were sold, with a clause that in case of non-performance, &c.; the estate demised should cease, &c., and a clause of re-entry for a breach of the covenants, &c., held, that the lessor might bring ejectment to recover the possession of the premises on the forfeiture. *Jackson ex dem. Lewis et ux* v. *Schutz*, 18 Johns. Rep. 174. Et vide *Jackson ex dem. Livingston* v. *Groat*, 7 Cow. Rep. 285. 287.

The estate of the lessee under such a lease, is a fee simple conditional at common law, or a fee simple subject to be defeated upon a condition subsequent. Ib.; per Platt, J.

And if the condition had been absolute not to alien, it would have been repugnant to the grant, and, therefore, void. Ib.

landlord knew of any of the breaches of the covenant at the time of bringing the ejectment.(*a*)

*Where the lessors of the plaintiff were both devisees and executors, and in each capacity rent was due to them, the defendant moved to stay proceedings on payment of the rent due to the lessors of the plaintiff as devisees, they not being entitled to bring ejectment as executors; there appeared to be a mutual debt to the defendant by simple contract, and the defendant offered to go into the whole account, taking in both demands, as devisees and executors, having just allowances, which the lessors of the plaintiff refused: the rule was made absolute to stay proceedings on payment of the rent due to the lessors as devisees, and costs.(*b*)

(*a*) Wadman *v.* Calcraft, 10 Vez. 67.
(*b*) Duckworth d. Tubley *v.* Tunstall, Barn. 184.

A covenant by a lessor, that if the lessee or his assigns shall be minded to sell or dispose of their interest they may do so, first giving the pre-emption to the lessor, and paying one-tenth of the purchase money to him: provided, that if these be not done, the lease shall be forfeited, is valid; and extends not only to an immediate assignment by the lessee, but to his assignee either by operation of law or voluntary sale. And if the latter assign without offering the pre-emption, and paying the tenth of the money, the lease is forfeited. Ib.; sed vide *Jackson ex dem. Livingston* v. *Kip*, 3 Wen. Rep. 230, 232. Opinion of the Court per Savage, Ch. J., limiting this decision; cited post, bage 160, n. [1]

If a tenant do an act proper in itself, he cannot be made a wrong doer, by a consequence which he could not anticipate: as if by turning the water of a creek, being an act of good husbandry, by causing the water to flow into a swamp, the timber growing there is killed, it is not to be deemed waste, so as to produce a forfeiture of the lease; especially, where the landlord has lain by for twenty years, during which time new trees had grown up, of more value than the old, and therefore, no permanent injury had been done to the inheritance. *Jackson ex dem. Van Rensselaer* v. *Andrew*, 18 Johns. Rep. 431.

Where a plaintiff in replevin denies in his plea, that the place in which the distress was taken was within the demised premises, such denial does not amount to a general disclaimer of all holding under the lessor, so as to work a forfeiture of the lease. *Jackson ex dem. Deridder* v. *Rogers*, 11 Johns. Rep. 33.

And in an action of ejectment by the landlord to recover the premises, on the ground of their being forfeiting by such disclaimer, the tenant may give in evidence, that the disclaimer was intended only as to the place in which the distress was taken, and also, that such place was not covered by the lease. Ib.

Whether the doctrine of forfeiture applies at all to a disclaimer by a tenant for life? *Quære.* Ib.

The words "and these presents, are upon this condition," (viz.) that the lessee shall suffer the lessor to enjoy a way reserved, through the demised premises, without obstruction, are sufficient in a durable lease to make the estate a conditional one, without an express, clause of re-entry; and if the way be obstructed, ejectment lies. *Jackson ex dem. Blanchard* v. *Allen*, 3 Cow. Rep. 220.

The proceedings may be staid, either by moving the Court, or in Vacation time by summons.(*a*)

*In moving for judgment against the casual ejector in an ejectment brought under the provisions of this statute, the Court will not grant a rule for judgment without an affidavit,(*b*)[1] pur- [*172]

(*a*) 2 Sell. Prac. 127.

(*b*) In the case of Doe d. Hitchings *v.* Lewis, (Burr. 614,) it appeared that the lessor of the plaintiff had once been tenant to the defendant, under a lease for a term of years, of which some were yet to come, and had been ejected by him nearly twenty years before, by a judgment in ejectment against the causual ejector, pursuant to the statute of 4 Geo. II. c. 28, for non-payment of rent. The title set up by the lessor in this last action was the irregularity of the proceedings in the first ejectment, from the want of a proper affidavit whereon to ground the judgment; and the question for the Court to decide, was, whether it was necessary for the defendant, (the original landlord,) to give evidence of this affidavit. The court were unanimously of opinion, that from the lapse of years no such evidence was necessary; but it seems to have been Lord Mansfield's opinion, that if the lessor of the plaintiff in the second action had proved, that in point of fact, no affidavit had been made, he would have been entitled to recover. But *quære*, if the proper method in such case, if the judgment be recent, is not to move the court, upon affidavit of facts, to set aside the judgment for irregularity.

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[1] Where the landlord, on a clause of re-entry for non-payment of rent, obtained judgment, by default, against the casual ejector, the record of the judgment, without the previous affidavit required by a statute being produced, is a sufficient defence to an ejectment, brought by the former tenant for the premises; *Jackson ex dem. Smith et al.* v. *Wilson*, 3 Johns. Cas. 295.

The tenant absconded, and the landlord took possession of the premises, and then brought an ejectment, as for a vacant possession, in order to bar the tenant's right, under the lease; the court, on motion, set aside the proceedings, with costs, as a nullity, ejectment not lying by a person already in possession; *Jackson ex dem. Clowes* v. *Hawkes*, 2 Caines' Rep. 335.

The plaintiff, if he proceed under the statute, (Sess. 36, chap. 63, sec. 23, 1 R. L. 440,) must show that there was no sufficient distress on the premises, or, if he proceed at common law, he must prove a demand of the rent; *Jackson ex dem. Van Rensselaer* v. *Collins*, 11 Johns. Rep. 1.

But if the tenant deny the title of the lessor, and disclaimed, by parol, to hold under him, it is a waiver of the necessity of the demand; ib.

It seems, that, where the lease contains no clause of re-entry, the landlord cannot bring ejectment under the statute; *Jackson ex dem. Van Rensselaer* v. *Hogaboom*, 11 Johns. Rep. 163.

The want of sufficient distress on the premises, must be at the time when the declaration in ejectment is served; ib.

If a lessee, holding lands under a lease, containing a clause of re-entry, in case of non-payment of rent, leave the premises, and persons, claiming title under the lessor, have been in possession for fourteen years, since the departure of the lessee, a demand and re-entry by the lessor will be presumed; *Jackson ex dem. Goose et al.* v. *Demarest*, 2 Caines's Rep. 382.

suant to the statute, that half-a-year's rent was in arrear before declaration served, that the lessor of the plaintiff had a right to re-enter, and that no sufficient distress was to be found upon the premises countervailing the arrears of rent then due: and the affidavit must also state the service of the declaration in ejectment on the tenant in possession, or that the premises were untenanted, or that the tenant could not be legally served, or as the facts may be, and in such cases that a copy of the declaration was affixed on the most notorious (stating what) part of the premises.(*a*)[1]

(*a*) App. No. 19; Doe d. Seabrook *v.* Roe, 4 B. Moore, 350; Doe d. Evans *v.* Roe, 4 B. Moore, 469.

A lease was executed in 1769, reserving rent, with a clause of re-entry for the non-payment of the rent, and the lessee died in 1775, without wife or children; and there being no evidence of a continuance of possession under him, or of payment of rent, and the lessor having taken possession in 1786; it was held, in 1809, that a re-entry by the lessor, for non-payment of rent, was to be presumed; *Jackson ex dem. Smith et al.* v. *Stewart*, 6 Johns. Rep. 34.

After a lapse of only nine years, a re-entery for the non-payment of rent will not be presumed; *Jackson ex dem. Donnally et al.* v. *Walsh*, 3 Johns. Rep. 226.

Ejectment, for the non-payment of the rent against a lessee, may be sustained under any statute without a demand of the rent, though the lease was executed before the statute; *Maidstone* v. *Stevens*, 7 Verm. Rep. 487.

A lease for lives contained a clause of re-entry, for non-payment of rent; or, if the lessee should have the possession for six months, or not perform the covenants, &c. The tenant left the premises in 1810, and the landlord, in April, 1811, executed another lease to the defendant, who entered and took possession of the premises, and the first lessee, who had paid no rent to his landlord, after the first of May, 1809, brought an action of ejectment in 1821, against the defendant, the second lessee, to recover the possession, held, that the right of the tenant, (the first lessee,) could be barred only by a recovery in ejectment, under the statute, and that, if a legal re-entry was to be presumed, it would be a re-entry under the statute, rather than at common law; but that, in the absence of any record, or evidence of a re-entry or a recovery in ejectment, under the statute, such re-entry could not be presumed; and that a re-entry at common law was not to be presumed, unless after a possession for fourteen years at least; and admitting that the landlord entered six months after his tenant had quitted the possession, that alone could not divest the apparent right of possession gained by the tenant, (or first lessee); *Jackson ex dem. Myers* v. *Ellesworth*, 20 Johns. Rep. 180.

[1] Where one of the conditions of the lease was, that the lessee should pay all taxes, &c.; held, that the lessor had no right to re-enter for a breach of the condition, without showing a demand of payment of the tax within the period required by law, in order to create a forfeiture. *Jackson ex dem. Weldon* v. *Harrison*, 17 Johns Rep. 66. Nor can the lessor re-enter, on the ground of forfeiture for the non payment of rent, without showing a demand of the rent due, on the last day, from the tenant on the premises, a convenient time before sunset, &c., or a strict compliance with all the formalities required by the common law: his claim being regarded *stricti juris*. Ib. Proving a demand of the rent of his tenant, at the house on the premises, in the afternoon of the last day, is sufficient. Ib.

This affidavit is of course only necessary upon moving for judgment against the casual ejector, or after a non-suit at the trial for the tenant's not confessing *lease, entry and ouster; but if [*173]

Where the lessor proceeds for a forfeiture, or to enforce a penalty, he must show a demand of the rent on the very day on which it was payable; but where the rent is payable on the land, and the lessor brings covenant, or proceeds by distress, to recover the rent, he need not show a previous demand, although the rent was payable on demand. *Remsen* v. *Conklin* 18 Johns. Rep. 447.

In the case of *Jackson ex dem. Livingston* v. *Kipp*, (3 Wen. Rep. 302,) the lessor of the plaintiff claimed to recover a farm for breach of conditions contained in an unexpired lease for lives of the premises, bearing date in 1795, executed by the ancestor of the lessors of the plaintiff to the father of the defendant, and under which he claimed title. The condition relied on was, that, if the yearly rent should be behind and unpaid for the space of twenty days after the day appointed for its payment, and that, if the lessee, his heirs, &c., should not observe, keep, and perform the several covenants in the indenture of lease expressed to be performed by the lessee, &c., the indenture and the estate thereby created were to be void, &c., and a right of re-entry was given to the landlord, his heirs and assigns. One of the covenants in the lease was, that, on every sale or assignment of the demised premises by the lessee, his heirs, &c., he or they should pay to the landlord, his heirs, &c., a fifth part of the consideration-money of such sale or assignment.

The plaintiff proved, that, in May, 1826, the rent due and in arrear amounted to the sum of $122, and that, in April, 1826, the property of the defendant was sold on execution. It appeared that at the time of the sale there was more than double the amount of property on the premises to satisfy the rent; and that, property to the amount of $150, purchased at the sale, was left on the premises, and continued there in the possession of the defendant at the time of the trial of the cause. It was not proved specifically that the estate of the defendant in the demised premises was sold under the execution. On this evidence, a verdict was taken for the plaintiff, subject to the opinion of the supreme court.

By the Court, SAVAGE, C. J.—"The plaintiff cannot sustain this action for the non-payment of rent, neither at common law nor under the statute. He cannot recover at common law, because he has not complied with the common law requirements, such as the demand of the precise amount of rent, on the day it fell due, at a convenient time before sundown. 7 T. R. 117; 1 Saund. 286, n. 16; Saund. on Pl. & Ev. 470. Nor can this action be sustained under the statute, because there was abundant property on the premises countervailing the arrears of rent, and which might have been distrained.

"Nor can the plaintiff recover for a breach for the non-payment of the fifth of the sale of the premises. The case is rather obscure as to the sheriff's sale, in April, 1826. It is not stated that the defendant's interest in the demised premises was sold; and, if there was no sale, there could be no forfeiture on that ground. If there was a sale of the premises, then a question I apprehend would arise, whether such sale was collusive, or whether it was *bona fide*, an adversary proceeding on the part of the creditor. If collusive, and made with intent to defeat the condition in the lease, then the plaintiff would be entitled to recover; but if *bona fide*, then, according to the opinion of Platt, Justice, in *Jackson* v. *Silvernail*, (15 Johns. Rep. 279,) such sale does not work a forfeiture; and such was the point decided by this court, in *Jackson ex dem. Schuyler* v. *Corliss*, (7 Johns. Rep. 531,) though an intimation to the contrary was thrown out by Mr. Justice Sutherland, in *Jackson* v. *Grant*, (7 Cow. Rep. 286.) Upon the facts appearing in this case, the defendant is entitled to judgment."

See *Connor* v. *Bradley*, 1 Howard U. S. Rep. 211; S. C., 17 Peter's Rep. 263; *Sperry* v. *Sperry*, 8 New Hamp. Rep. 477.

the tenant appear, and the ejectment come to trial, the matters contained in the above affidavit must be proved.(*a*)

Where, by a written agreement, A. agreed to let, and B. agreed to take premises for a term of years, "at and under the yearly rent of 80*l.*," and the agreement contained several specific agreements by B. to do certain things, but there was no specific agreement to pay the the rent, and a power of re-entry was reserved in case of a breach of "any of the agreements therein contained," it was held, that the power extended to the non-payment of rent.(*b*)

Where a lease contained two clauses for re-entry, the one in case the yearly rent of 300*l.* was in arrear thirty days after it became payable, and the other in case the yearly rent was in arrear, which was stated to be payable half-yearly at Lady-day and Michaelmas; it was held, that the landlord had a right to re-enter on non-payment of each half-year's rent: the *former clause containing the description of the amount to be annually paid, and the latter the times for payment.(*c*)

When a forfeiture has accrued upon a clause of re-entry for rent in arrear, such forfeiture will be waived if the landlord do any act after the forfeiture, which amounts to an acknowledgment of a subsisting tenancy; as if he receives rent due at a subsequent quarter, or distrain for that in respect of which the forfeiture accrued, or receive the same and give a receipt for it as for so much rent, or in which he calls the party his tenant.[1] It seems, however, according to the old authorities, that in the case of a lease for years, the bare acceptance by the lessor at a subsequent day of the rent, in respect of which the forfeiture

(*a*) Doe d. Hitchings *v.* Lewis, Burr. 614, 20.
(*b*) Doe d. Rains *v.* Kneller, 4 C. & P. 3.
(*c*) Doe d. Rudd *v.* Golding, 6 Moore, 231.

[1] Same point, Jackson ex dem. Norton *v.* Sheldon, 5 Cow. Rep. 448.

To make a receipt for rent operate as a waiver of a forfeiture of the estate demised; the rent must not only be received after the forfeiture is incurred, but such rent so received must have accrued after that time. Jackson ex dem. Blanchard *v.* Allen, 3 Cow. Rep. 220.

And this validates the lease only to the time when the rent so received accrued; but will not operate as a waiver of a forfeiture incurred by continuing the original cause of the forfeiture after the day on which the rent received fell due. Ib.

If the lessor is ignorant that a forfeiture has been incurred, acceptance of rent is not a waiver of it. Jackson ex dem. Church *v.* Bronson, 7 Johns. Rep. 227.

See Coon *v.* Brickett, 2 New Hamp. Rep. 163; Prindle *v.* Anderson, 19 Wen. 391; Stedman *v.* M'Intosh, 5 Iredell, 571.

accrued, although before ejectment brought, will not of itself, unless accompanied with circumstances which show an intention to continue the tenancy, bar him of his right to re-enter, because the rent is a duty due to him, and as well before as after re-entry, he may have an action of debt for the same on the contract between the lessor and lessee; but that in the case of a lease for life, the mere acceptance of such rent will be sufficient to affirm the lease, as the lessor could not receive it as due upon any contract, but must receive it as his rent; for when he accepted the rent he could not have an action of debt for it, but his remedy was by assize, if he had seisin or distress.(*a*)

*Where an ejectment was brought upon a proviso of re- [*174]
entry for non-payment of rent, and the lessor also commenced an action of covenant for rent, accruing subsequently to the day of the demise in the ejectment, and the tenant paid into Court the rent demanded in the action of covenant, the forfeiture was holden to be waived; but it seems doubtful whether the commencement of the action of covenant was *of itself* sufficient to waive the forfeiture.(*b*)

A right of re-entry for non-payment of rent under the stat. 4 Geo. II., c. 28, will not be waived by taking an insufficient distress for that rent, nor by continuing in possession under such distress after the expiration of the last day for the payment of the rent.(*c*) [1] But the mere act of taking a distress, although an insufficient one, is a waiver of a right of re-entry at common law.(*d*)

(*a*) Green's case, Cro. Eliz. 3; S. C., 1 Leon. 262; Pennant's case, 3 Co. 64; *et vide* Doe d. Cheny *v.* Batten, Cowp. 243.

(*b*) Doe d. Crampton *v.* Minshul, B. N. P. 96; S. N. P. 650.

(*c*) Doe d. Taylor *v.* Johnson, 1 Stark. 411.

(*d*) Brewer d. Lord Onslow *v.* Eaton, K. B. *Easter Term*, 1773, MS. This case, as cited in Goodright d. Charter *v.* Cordwent, 6 T. R. 220, seems to warrant a conclusion, that the taking of an insufficient distress will not waive a right of re-entry at common law. I have been favored by Mr. Jardine with a MS. report of the case, taken from the note-book of Gibbs, C. J., (the marginal note being in his hand-writing, and the body of the note in the hand-writing of Mr. Justice Dampier,) which limits the principle to cases under the stat 4 Geo. II. c. 28. The note is subjoined.

Brewer d. Lord Onslow *v.* Eaton. An ejectment may be supported on 4 Geo. II. c. 28,

[1] Where a landlord had distrained for rent in arrear, though the distress was insufficient to satisfy it, it was held, that he could not afterwards bring ejectment on account of the same rent, upon the clause of re-entry under the 23d section of the statute concerning distresses, rents, and the renewal of leases. 1 R. L. New York, 440, 441. And that the act of distraining waives the forfeiture. Jackson ex dem. Norton *v.* Sheldon, 5 Cow. Rep. 448.

[*175] *With respect to the construction of provisoes for re-entry for the non-performance of covenants or conditions, no general

though the landlord, subsequently to the time of the demise, distrained for rent accruing previously to that, for the non-payment of which the ejectment was brought.

Ejectment under 4 Geo. II. c. 28, for non-payment of rent, £200 was in arrear for two years' rent due at Michaelmas, 1782; on the 3rd of December, Lord Onslow distrained, and could levy but 35*l.* For this distress a replevin was still subsisting; the declaration in ejectment was delivered in January, and the demise laid in October 3rd, 1782. The plaintiff had a verdict before Mr. J. Ashurst, and liberty was reserved for the defendant to move for a non-suit if this Court should admit of an objection which was now pursued; viz. that the landlord having taken a distress subsequently to the time of the demise, had thereby waived his right of entry.

Erskine for plaintiff; *Morgan* for defendant.

Lord Mansfield, C. J. At common law, if a distress had been taken after an ejectment brought for a forfeiture, the Court would lay hold of this or any other grounds they could, to say the landlord had waived his forfeiture, because forfeitures are rendered odious in law. It is like the receipt of rent after the demise, about which there was so long a puzzle. That is now finally settled to be no objection to an ejectment; it is receiving what the landlord might have recovered in an action for mesne profits. Here the party has a right of re-entry; then, by the statute, he has a right to recover in a particular way, if there is not a sufficient distress. He has distrained since: that is no presumption of the waiver of his right of entry, because it is consistent with it; it seems a necessary step to ascertain the sufficiency of the distress.

Willes, J. At common law the landlord had two remedies, re-entry and distress. The resorting to the latter would have been a waiver of the re-entry; but if the distress be not sufficient, the statute restores that remedy, when, by the common law, the waiver had taken it away.—Rule discharged.

It may be useful to notice in this place a provision of the Legislature in one particular case of rent in arrear, although it does not strictly belong to a treatise on ejectment. By the statute 11 Geo. II., c. 19, s. 16, (extended by 57 Geo. III. c. 52, to cases where a half-year's rent shall be in arrear,) after reciting that landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to be uncultivated, without any distress thereon, whereby the landlords or lessors might be satisfied for the rent in arrear; but also refusing to deliver up the possession of the demised premises, whereby the landlords are put to the expense and delay of recovering them in ejectment; it is enacted, "that if any tenant holding any lands, tenements, or hereditaments, at a rack rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent, shall desert the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent; it shall and may be lawful, to and for two or more justices of the peace of the county, riding, division, or place, (having no interest in the demised premises,) at the request of the lessor or landlord, lessors, or landlords, or his, her, or their bailiff or receiver, to go upon and view the same, and to affix, or cause to be affixed, on the most notorious part of the premises, notice in writing, what day (at the distance of fourteen days at least,) they will return to take a second view thereof; and if, upon such second view, the tenant, or some person on his or her behalf, shall not appear, and pay the rent in arrear, or there shall not be sufficient distress upon the premises; then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises,

*principle can be laid down, excepting that which arises out of the *maxim of our law, that every doubtful grant shall be [*176] construed in favor of the grantee; but no strained or forced interpretation shall be given to any covenant or condition, for the purpose of defeating its effect. "Provisoes of this sort," says Lord Tenterden, "are not to be construed with the strictness of conditions at common law. These are matters of contract, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view of cases of this sort, the provisoes ought to be construed according to fair and obvious constructions, without favor to either side."(*a*)

The clearest method of showing the application *of these [*177] rules, will be by giving a short digest of the cases upon the subject.

Where the lessee covenanted not to *assign* his term without the lessor's consent, and afterwards *devised* his term without such consent, it was holden not to amount to a forfeiture, for a *devise* is not a *lease*.(*b*)

Where the lessee covenanted not to demise, assign, transfer, or set over, or *otherwise do or put away* the lease or premises, or †any part thereof, and afterwards made an *under-lease* of the premises, it was held not to be a breach of the covenant, for an *under-lease* is not an *assignment*. And it was said by the Court, in answer to an argument, that although an *under-lease* did not amount to an *assignment*, yet that it was a *transferring*, *setting over*, *doing*, *or putting away with the premises*,

and the lease thereof to such tenant, as to any demise therein contained only, shall from thenceforth become void."

Section 17. "Provided always that such proceedings of the said justices shall be examinable in a summary way, by the next justice or justices of assize of the respective counties in which such lands or premises lie; and if they lie in the city of London, or county of Middlesex, by the Judges of the Courts of King's Bench, or Common Pleas; and if in the counties palatine of Chester, Lancaster, or Durham, then before the judges thereof; who are hereby respectively empowered to order restitution to be made to such tenant, together with his or her expenses and costs, to be paid by the lessor or landlord, lessors or landlords, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs, not exceeding five pounds, for the frivolous appeal." The provisions of this statute, however, like those of 4 Geo. II., c. 28, are holden to extend only to cases where the landlord has a right of re-entry reserved to him by the demise. Wood, L & T. 523.

(*a*) Doe d. Davis *v.* Elsom, 1 M. & M. 189.

(*b*) Fox *v.* Swan, Sty. 482.

that the devising a term *was a doing or putting it away*, so being in debt by confessing a judgment, and having the term taken in execution was the like, but that none of these amounted to a breach of the covenant.(*a*) [1]

It seems to have been once holden, that if a lessee for years grant the lands to another for the whole term he has therein, but [*178] reserve the rent payable to *himself, and not to the original lessor, it will be a lease, and not an assignment, notwithstanding the want of a reversion in the party so granting; but this doctrine, if the decision were as reported, has since been overruled.(*b*)

Where the lease contained a proviso, that the lessee should not *let*, or assign *over*, the whole, or any part, of the premises, it was held that

(*a*) Crusoe d. Blencowe *v.* Bugby, 3 Wils. 234.

(*b*) Poultney *v.* Holmes, Stran. 405; Palmer *v.* Edwards, Doug. 187, *in notis.* It seems, from these cases, that a parol assignment of the whole term, which is void by the Statute of Frauds, will be good as an under-lease; but *quære* if the tenancy thereby created does not enure as a tenancy from year to year, and not as a tenancy for the residue of the term. Vide Doe d. Rigge v. Bell, 5 T. R. 471; Clayton *v.* Blakey, 8 T. R. 3.

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[1] Where a lessee for lives covenanted not to sell, dispose of, or assign his estate in the demised premises, without the permission of the lessor, &c., and the lease contained a clause of forfeiture for non-performance of covenants; held, that a lease of part of the premises by the lessee for twenty years, was not such a breach of the covenant; and that nothing short of an assignment of his whole estate, by the lessee, would produce a forfeiture of the lease. Jackson ex dem. Stevens *v.* Silvernail, 15 Johns. Rep. 278. *Et vide*, Jackson ex dem. Livingston *v.* Groat, 7 Cow. Rep. 285, 287.

Nor would a sale of the whole premises, under a judgment and execution against the lessee, work a forfeiture, there being no evidence of any fraud or collusion on the part of the lessee. Ib.

So, where a lease, for the term of seven years, contained a like covenant, that the lessee "should not assign over, or otherwise part with the indenture, or the premises thereby leased, or any part thereof," &c., and there was a clause of re-entry for a breach of covenants; held, that no forfeiture was incurred by an under-letting for two years. Jackson ex dem. Weldon *v.* Harrison, 17 Johns. Rep. 66.

Covenant, "not to let, set, assign, transfer, set over, or otherwise part with the premises demised, or the lease," of a coffee-house, is not broken by proof of a deposit of the lease with the brewers of the lessee, as a security for beer supplied to the house. Doe ex dem. Pitt *v.* Hogg, 4 Dowl. & Ryl. Rep. 226.

In New Hampshire, where a lease was given which contained a covenant that the lessee should pay certain rent and taxes, and should make no strip or waste, nor lease, nor underlet the premises without the consent of the landlord, and, further, that he might re-enter if the lessee failed in the payment of the rent and taxes, or if he committed waste: it was held, that an assignment of the lease was not a forfeiture, but merely gave the landlord a claim for damages. Spear *v.* Fuller, 8 New Hamp. Rep. 174.

the lessee could not *under-let* without incurring a forfeiture; because the word *over* was annexed only to the word *assign*, and therefore the condition was broken if the lessee *let* the premises, or any part of them, for any part of the time.(*a*)[1] And where the proviso was not to assign, or *otherwise part with the premises*, for the whole, or any part, of *the term, the proviso was held to be broken by an under-lease, as well as by an assignment.(*b*)

Where the covenant, was not to set, let, assign, transfer, set over, or *otherwise part with*, the premises thereby demised, or *that present indenture of lease*, a deposit of the indenture with a creditor, as a receipt for money advanced, was held not to *be a *parting with* [*179] *it*, within the meaning of the covenant.(*c*)

Where a lease contained a proviso for re-entry in case the tenant should demise or let the demised premises, or any part thereof, for all or any part of the term, the lessee agreed with a person to enter into partnership with him, and that he should have the use of certain parts of the premises *exclusively*, and of the rest jointly with him the tenant, and accordingly let him into possession; it was held that the lease was forfeited, for that it was a parting with the exclusive possession of some part of the demised premises, and whether it were gratuitously or for rent reserved was immaterial.(*d*)[2]

(*a*) Roe d. Gregson *v.* Harrison, 2 T. R. 425.
(*b*) Doe d. Holland *v.* Worseley, 1 Campb. 20.
(*c*) Doe d. Pitt *v.* Laming, 1 R. & M. 36.
(*d*) Roe d. Dingley *v.* Sales, 1 M. & S. 297.

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[1] If it be covenanted in a lease, "that, in case the lessee should suffer or permit more than one person to every hundred acres, to reside on, use, or occupy any part of the premises, the lease should be void," and the lessee lets part of the premises to persons, for a year, to cultivate for shares, in the proportion of more than one to each hundred acres, it is a breach of the condition, and defeats the lease. Jackson ex dem. Colden *v.* Brownell, 1 Johns. Rep. 367; Jackson ex dem. Colden *v.* Rich, 7 Johns. Rep. 194.

But, where the quantity of land demised was 135 acres, and a like covenant in the lease, it is not a breach for the lessee to permit another tenant besides him to occupy the premises. Jackson ex dem. Colden *v.* Agan, 1 Johns. Rep. 273.

[2] If the lease contain a covenant that the lessee shall not assign without the permission of the lessor, and the lessee do assign part of the premises with the consent of the lessor, it is not a surrender, but the lessee still remains liable for every act of the assignee, amounting to a breach of the covenants contained in the lease. Jackson ex dem. Church *v.* Brownson, 7 Johns. Rep. 227.

A covenant not to under-let any part of the premises without license, is not broken by taking in lodgers;[1] for, per Lord Ellenborough, C. J., "The covenant can only extend to such under-letting as a license might be expected to be applied for, and who ever heard of a license from a landlord to take in a lodger?"(*a*)

A covenant not to "alien, sell, assign, transfer, and set over, *or otherwise part with the lease*" of a public house, is not broken by depositing the lease with the brewers to cover advances by them.(*b*)

*Where the lessee enters into covenants not to assign, &c.,[2] the Court will distinguish between those acts which are done by him voluntarily, and those which pass *in invitum*, and will not hold the [*180] latter to *be a breach of the covenant. Thus, if the lessee become bankrupt, and the term be assigned under the commission, no forfeiture will be incurred;(*c*) unless, indeed, there be an express stipulation in the proviso that it shall extend to the bankruptcy of the lessee.(*d*) And where a lessee, who had covenanted not to "let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," with a proviso, that in such case the landlord might re-enter, afterwards gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold; it was held to be no forfeiture of the lease, unless the warrant of attorney were given expressly for the purpose of having the lease taken; for judgments, in contemplation of law, always pass *in invitum*. And Lord Kenyon, C. J., said, "there was no difference between a judgment obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney; since the latter is merely to shorten the process, and lessen the expense of the proceedings:" but if the warrant of

(*a*) Doe d. Pitt *v.* Laming, 4 Campb. 77.
(*b*) Doe d. Goodbehere *v.* Bevan, 3 M. & S. 353.
(*c*) Doe d. Pitt *v.* Hogg, 1 C. & P. 160.
(*d*) Roe d. Hunter *v.* Galliers, 2 T. R. 133.

[1] Letting land upon shares, for a single crop, does not amount to a lease of the land, and the owner alone can bring trespass. Bradish *v.* Schenck, 8 Johns. Rep. 151.

[2] In ejectment on a clause of re-entry, in case the tenant should assign, set over, or otherwise let the premises, it is not sufficient to prove the defendant, a stranger, in possession of the demised premises, and his declaration that they were demised to him by another stranger. Doe *v.* Payne, 1 Starkie's Rep. 86.

And such evidence would not be sufficient even if the the tenant had covenanted not to part with the possession. Ib.

attorney be expressly given for the purpose of having the lease taken in execution, it will be held to be in fraud of the covenant, and a forfeiture of the lease.(*a*)[1]

This protection extends also to the party to whom the term is by law assigned. The reason of this is, that such assignee cannot be encumbered with the engagement belonging to the property which he *takes, but must be allowed to divest himself of it, and con- [*181] vert it into a fund for the benefit of the *creditors; and therefore a forfeiture is not incurred, if the assignees sell the term.(*b*)

But where one leased for twenty-one years, "if the tenant, his executors, &c., should so long continue to inhabit and dwell in the farm-house, and *actually occupy* the lands, &c., and not let, set, assign over, or otherwise depart with the lease," the tenant having become bankrupt, and his assignees having possessed themselves of the premises, and sold the lease, and the bankrupt being out of the possession and occupation of the farm, it was held, that the lessor might maintain ejectment. And this case was distinguished from the one just mentioned, as not being a case of forfeiture; but one in which the term itself was made to continue and depend upon the personal occupation of the lessee, and that therefore the term itself ceased, when the lessee had no longer the occupation of the farm.(*c*)

Where a lease contained a proviso for re-entry if the lessor, "his executors or administrators, or either of them should become bankrupt," and the executor became bankrupt, it was held, that the proviso

(*a*) Doe d. Mitchinson *v.* Carter, 8 T. R. 57, 300.
(*b*) Doe d. Goodbehere *v.* Bevan, 3 M. & S. 353.
(*c*) Doe d. Lockwood *v.* Clarke, 8 East, 185.

[1] A lessor reserved one quarter of the money arising from every letting, assigning, or disposing of the premises by the lessee, who covenanted, that whatever he should incline, or be, by law or otherwise, obliged to sell, &c., he would make the first offer to the lessor, giving him notice of the price, &c.; and it was provided, that every sale, renting, &c., should be void, and the premises revert to the lessor, unless the seller or purchaser should pay the lessor the one-fourth of the money offered, &c. The tenant who held under the lease confessed a judgment, on which an execution issued, and the lease was sold by the sheriff: held that his was not a forfeiture, unless the judgment had been confessed fraudulently, or for the purpose of enabling the creditor to take the lease in execution under the judgment, and with a view to defeat the lessor's reservation of one-fourth of the money offered. Jackson ex dem. Schuyler *v.* Corliss, 7 Johns. Rep. 531.

attached; Parke, B., observing, "that where words are so clear, parties must be bound by their own express stipulations, however absurd."(*a*)

Where the lease contained a proviso for re-entry on the lessee assigning without license, and the lessee executed a deed purporting to convey all his property, real and personal, to trustees, for the benefit of his creditors, and afterwards a commission of bankrupt was taken out against him, and he was duly declared a bankrupt; it was held that the trust-deed, being an act of bankruptcy and void, did not
[*182] *operate as a *valid assignment of the lessee's interest in the lease, nor create a forfeiture.(*b*)

It has been doubted whether a proviso that the lease shall cease, and from thenceforth become absolutely void if the lessee shall, during the continuance of the term, "happen to become insolvent and unable in circumstances to go on with the management of the farm," attaches upon the attaintment of the lessee of felony. But at all events it is not a continuing breach. It attaches, if at all, upon the conviction, and may be removed by a subsequent receipt of rent.(*c*)

Where a lease contained an exception out of the demise of all the trees upon the demised premises, and also a proviso, for re-entry if the defendant should commit any *waste in or upon the said demised premises*, it was held to be no forfeiture of the lease, to cut down the trees excepted; for that waste could only be committed of the thing demised, and the trees were excepted out of the demise.(*d*)[1]

(*a*) Doe d. William *v.* Davies, 6 C. & P. 614; S. C., 5 Tyrr. 125.
(*b*) Doe d. Lloyd *v.* Powell, 5 B. & C. 308.
(*c*) Doe d. Griffith *v.* Evans, 5 B. & Ad. 765.
(*d*) Goodright d. Peters *v.* Vivian, 8 East, 190.

[1] Where a jury would not be warranted by the evidence in an action under the statute for waste, to find a verdict for the plaintiff, a judge is not authorised in an action of ejectment, founded on an alleged forfeiture for waste, to instruct a jury that the acts complained of, simply because done without the permission of the landlord, work a forfeiture of the tenant's right; he should submit the question to the jury to determine whether the acts done were in fact prejudicial to the plaintiff's interest. Jackson ex dem. Thomas *v.* Tibbits, 3 Wen. Rep. 341.

It seems, that if the waste be committed in a dwelling-house, part of the property demised, only such parts of the dwelling-house are forfeited as the waste is committed in. Ib.

Waste by dowress, or other tenant for life, will not support a recovery in ejectment by the revisioner. Robinson *v.* Miller, 2 B. Monroe Rep. 284.

A covenant, "not to permit any trade or business whatsoever," to be exercised upon the demised premises, is broken by an assignment to a schoolmaster, who kept his school upon the premises.(*a*)

A covenant that the lessee shall not exercise the trade of a butcher upon the premises, is broken by selling there raw meat by retail, although no beasts were there slaughtered.(*b*)

A covenant not "to use premises for the sale of pork," would, it seems, be broken by exposing carcasses of swine on *the premises, and making bargains there for sale, although the carcasses be taken to other premises to be cut up, and the bills for the meat supplied be made out as from such other premises.(*c*)

A proviso for re-entry if the lessee shall permit *any person [*183] to inhabit the premises who should carry on certain specified trades, (that of a licensed victualler not being one,) *or any other business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the lessor's tenants*, is not broken by the opening of a public house.(*d*)

Where a lease contained a covenant "to insure and keep insured a a given sum of money upon the premises during the term, in some sufficient insurance office," the covenant was interpreted, by reasonable intendment, to mean insurance against fire; and the lessee, having insured the proper sum, but omitted to pay the annual premium within the time allowed by the office for payment, was held to have forfeited his lease upon a clause of re-entry, although he paid the premium within fourteen days after such time, and no action had been commenced, and no accident had happened by fire, to the premises, in the mean time.(*e*) But where, in pursuance of a similar covenant, the les-

(*a*) Doe d. Bish *v.* Keeling, 1 M. & S. 95.

(*b*) Doe d. Gaskell *v.* Spry, 1 B. & A. 617.

(*c*) Coe d. Davis *v.* Elsam, 1 M. & M. 189. In this case, the proviso was thus worded, that it should be lawful for the lessor to re-enter, "if any auction should be had on the premises, *or use them for the sale of pork*," it was objected that these words were ungrammatical and insensible; but it was ruled by Lord Tenterden, that the proviso must be considered to have the same effect as if it had been expressed "in case the premises should be used for the sale of pork."

(*d*) Jones *v.* Thorne, 1 B. & C. 715.

(*e*) Doe d. Pitt *v.* Sherwin, 3 Campb. 134; Doe d. Flower *v.* Peck, 1 B. & Ad. 428; *vide*, Rolfe *v.* Harris, and Reynolds *v.* Pitt, 2 Price, 206, 212; and Bracebridge *v.* Buckley, 2 Price, 200.

see effected an insurance, (the policy containing a memorandum, that in case of the death of the assured, the policy might be continued to his personal representative, provided an indorsement to that effect was made *upon it within three months after his death), and died, and the representative, after the three months had expired, [*184] but *before ejectment brought, obtained the proper indorsement, Lord Ellenborough, C. J., was of opinion that the policy did not become void for want of the indorsement within the three months, but at most was only rendered voidable at the option of the company, and ruled, that no forfeiture was incurred.(*a*) He also expressed strong doubts of the legality of the proviso on the policy requiring the indorsement, considering that the benefit of the policy enured to the representative, the same being for a definite time.

A covenant in a lease to deliver up at the end of the term, all the trees standing in an orchard at the time of the demise, "*reasonable use and wear only excepted*," is not broken by removing trees decayed and past bearing, from a part of the orchard which was too crowded ;(*b*) but a covenant not to remove or grub up trees, is broken by removing trees from one part of the premises to another ; and also by taking away trees, although the lessee plant a greater quantity than he takes away.(*c*)

A lease with a clause of re-entry, for non-performance of covenants, contained a general covenant on the part of the lessee, to keep the premises in repair, and also another independent covenant to repair, within three months after notice ; the landlord, after serving the tenant with a notice to repair *forthwith*, was allowed to bring an ejectment within the three months, for a breach of the general covenant to repair.(*d*) But where, on similar covenants, and with a similar clause of re-entry, the landlord gave a notice to repair *within the three calendar months* from the date of the notice, it was held that †he had, by such notice, precluded himself from insisting on the forfeiture until the expiration of the three months.(*e*)

(*a*) Doe d. Pitt *v.* Laming, 4 Campb. 76.
(*b*) Doe d. Jones *v.* Crouch, 2 Campb. 449.
(*c*) Doe d. Wetherell *v.* Bird, 6 C. & P. 195.
(*d*) Roe d. Goatley *v.* Paine, 2 Campb. 520.
(*e*) Doe d. Morecraft *v.* Meux, 4 B. & C. 606 ; *vide* Doe d. Rankin *v.* Brindley, 4 B. & A. 84.

A covenant "forthwith" to put premises into complete repair, must receive a reasonable construction, and is not to be limited to any specific time, and it is for the jury to say, upon the evidence, whether the lessee has done what he reasonably ought in the performance of it.(*a*)

A proviso giving power of re-entry, if the lessee "shall do or cause to be done any act, matter, or thing contrary to and in breach of any of the covenants," does not apply to a breach of covenant *to repair*, the omission to repair not being *an act done* within the meaning of the proviso.(*b*)

A proviso giving power of re-entry if the tenant *make default in performance* of any of the clauses, by the space of thirty days *after notice*, does not apply to the breach of a covenant not to allow alterations in the premises, or permit new buildings to be made upon them without permission, and no forfeiture is incurred by the erection of a portico contrary to such covenant, and a neglect to remove it after notice.(*c*)

*The breaking of a door-way through the wall of a demised [*185] house into an adjoining house, and keeping it open for a long space of time, has been held to amount to a breach of covenant to repair.(*d*) So also pulling down a brick wall dividing two court-yards, has been held a breach of covenant "to repair and maintain the brick walls, &c.;"(*e*) but where the covenant was "to repair and keep in repair the premises, and **also such buildings, improvements, and additions as should be made thereon by the lessee*," it was held, that no forfeiture was incurred by changing the lower windows into shop windows, stopping up a door-way, and making a new one in a different place; the covenant being only against *non-repair*, and it being implied by the terms of the lease, that additions or improvements were to be made.(*g*)

Where a lease contained a general covenant to repair, and a further covenant that if the lessee did not repair after notice, the lessor might enter and do the repairs himself, with right of distress for the amount

(*a*) Doe d. Pitman *v.* Sutton, 9 C. & P. 706.
(*b*) Doe d. Abdy *v.* Stevens, 3 B. & Ad. 299.
(*c*) Doe d. Palk *v.* Marchetti, 1 B. & Ad. 715.
(*d*) Doe d. Vickery *v.* Jackson, 2 Stark. 293.
(*e*) Doe d. Witherell *v.* Bird, 6 C. & P. 195.
(*g*) Doe d. Dalton *v.* Jones, 4 B. & Ad. 126.

of such repairs, and the lease also contained a proviso for re-entry upon breach of any covenant, and the lessor gave the lessee notice to repair the premises within the period given by the lease, and that if he the lessee did not repair within such period, he the lessor would perform the repairs, and charge the lessee with the expense, and the premises were not in fact repaired by either party; it was held, that the lessor, having elected to perform the repairs, and charge the lessee with the expense, could not proceed to recover the premises as on a forfeiture.(*a*)

Where a lease contained a proviso for re-entry, if the lessee committed waste to the value of 10*l.* and the tenant pulled down some old buildings of more than 10*l.* value, and substituted others of a different description; it was held that the waste contemplated in the proviso *was waste producing an injury to the reversion;* and that it was a question for the jury whether *such waste* had been committed.(*b*)

A covenant for a landlord to be allowed to come into a house to see the state of repair at "convenient times," is not broken *by his not being allowed to go into some of the rooms, if the tenant had no previous notice of his coming.(*c*)

Where a lease contained a covenant that the lessee should not assign without leave, after which covenant was a proviso, that if the rent should be in arrear, or if all or any of the covenants *thereinafter* contained on the part of the lessee, should be broken, it should be lawful for the lessor to re-enter, and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor, that the lessee paying rent, and performing all and every the covenants *thereinbefore* contained on his part to be performed, should quietly enjoy; it was held that the lessor could not re-enter for breach of the covenant not to assign, the proviso being restrained by the [*186] word "*thereinafter*" to subsequent *covenants, and although there was none such, yet the Court could not reject the word.(*d*)

(*a*) Doe d. De Rutzen *v.* Lewis, 5 Ad. & Ell. 277.
(*b*) Doe d. Earl of Darlington *v.* Bond, 5 B. & C. 855.
(*c*) Doe d. Wetherell *v.* Bird, 6 C. & P. 195.
(*d*) Doe d. Spencer *v.* Godwin, 4 M. & S. 265.

But where the lease contained a proviso, that the tenant should not carry any hay, &c., off the premises, under a certain penalty, and a clause followed, enumerating all the covenants except the above, and provided that upon breach of any of the covenants the lessor might re-enter; it was held, notwithstanding the penalty and the omission of the covenant in the enumeration, the clause of re-entry applied.(*a*)

Where a beneficial long lease reserved to the lessee the liberty to cut down and dispose of all timber, &c., subject to a proviso, that *when and so often as* the lessee should intend, during the term, to fell timber, &c., he should give notice in writing to the lessor, who should thereupon have the option of purchasing it, with a power of re-entry, in case of a breach of *this proviso, and the lessee, soon after the execution of the lease, (at that time intending *bona fide* to cut down the whole of the then growing timber,) gave the proper notice in writing to the lessor, who did not accept the purchase, but disclaimed it; the lease was not forfeited, although the lessee did not forthwith fell all the timber, &c., but proceeded to cut down the same in different seasons at his own convenience, without giving any fresh notices to the lessor or his assignee, to whom he had, previously to the last cuttings, conveyed his interest.(*b*)

Where a lease of certain wagon-ways was granted to A. B. by an act of Parliament, in which, as well as in the lease, there was a proviso for re-entry, in case of neglect in any one year, **to* [*187] *bring a certain number of coals to C.*, for the use of the inhabitants of L., and sell them there at a certain price; and by a subsequent act, the preamble of which recited that the price was inadequate, and that the inhabitants of L. would sustain great inconvenience if A. B. ceased to supply them with coals, it was enacted, first, that the former act, confirming the lease, (except such parts as were thereby altered or repealed,) should continue; then that A. B. might sell his coals, brought to and deposited at C., *or at any other place near thereto, to be used as a repository for coals instead thereof*, at a certain increased price; and another section provided, that if A. B. neglected to bring the stipulated quantity of coals to C., *or to such other place near thereto, to be used as a repository for coals instead thereof*, and sell them there at the price fixed

(*a*) Doe d. Antrobus v. Jepson, 3 B. & Ad. 402.

(*b*) Goodtitle d. Luxmore *v.* Saville, 16 East. 87; Lord Ellenborough, C. J., and Le Blanc, J., intimated an opinion, that a Court of Equity would probably, under the circumstances, give the lessor or his assignee a new option to purchase.

by the act, his interest in the wagon-ways should cease: it was held, that although the preamble did not recite an intention to give A. B. the liberty to change the place used as a *repository for coals, and although it was not expressly enacted that he might do so, yet that the intention of the Legislature to give him that privilege was clear, and that he might do so without forfeiting his interest in the wagon-ways; because, in construing acts of Parliament, the Court must take into consideration, not only the language of the preamble, or of any particular clause, but of the whole act; and if in some of the enacting clauses expressions are found of more extensive import than in others, or than in the preamble, the Court will give effect to those more extensive expressions, if, upon a view of the whole act, it *appears to have been the intention of the Legislature that they should have effect.(*a*)

[*188]

In all the cases above mentioned, the tenancy was created by deed; but the principle is the same if the tenant holds under an agreement for a lease, which specifies the covenants to be inserted in the lease, and that there shall be a power of re-entry for a breach of them.(*b*)

By a memorandum of agreement, in consideration of the rent and *conditions* thereinafter mentioned, A. was to have, hold, and occupy, as on lease, certain premises therein specified, at a certain rent per acre. And it was *stipulated*, that no buildings should be included or leased by virtue of the agreement; and it was further *agreed and stipulated*, that A. should take at the rent aforesaid, certain other parcels, as the same might fall in; and lastly, it was *stipulated and conditioned* that A. should not assign, transfer, or under-let, any part of the said lands and premises otherwise than to his wife, child, or children; it was held, that by the last clause *a condition* was created, for the breach of which the lessor might maintain an ejectment.(*c*)

†But in an agreement to let, in which there was no clause of entry, the following stipulation was held to be a covenant, and not a condition operating in *defeasance of the estate: "It is also hereby agreed, and clearly understood, that in case the said A. W., or his heirs, &c., should want any part of the said land to build

[*189]

(*a*) Doe d. Bywater v. Brandling, 7 B. & C. 643.
(*b*) Doe d. Oldershaw *v.* Breach, 6 Esp. 106.
(*c*) Doe d. Henniker *v.* Watt, 8 B. & C. 308.

or otherwise, or cause to be built, then the said T. R., or his heirs, &c., shall and will give up that part or parts of the said lands as shall be requested by the said A. W., by his making an abatement in proportion to the rent charged, and also to pay for so much of the fence, at a fair valuation, as he shall have occasion from time to time to take away, by his giving or leaving six months' notice of what he intends to do."(*a*)

Next, of the parties who may take advantage by forfeiture of the breach of a covenant or condition.

To enable a reversioner(*b*) to take advantage of a forfeiture, it is necessary that he should have the same estate in the lands at the time of the breach, as he had when the condition was created; and extinguishment of the estate in reversion, in respect of which the condition was made, extinguishing the condition also.(*c*) Thus, where a lease was made for a hundred years, and the lessee made an under-lease for twenty years, rendering rent, with a clause of re-entry, and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion *of the term; it was holden that the [*190] grantee should not have either the rent, or the power of re-entry, for the reversion of the term to which they were incident was extinguished in the reversion in fee.(*d*)

The reversioner must also be entitled to the reversion, at the *time the forfeiture is committed, or he cannot take advantage of it.(*e*)

When the condition is, that the lessee will not do any particular act without leave from his lessor, if leave be once granted, the condition is gone for ever; for the condition is to be taken strictly, and by the license it is satisfied.(*g*) And, in like manner, when a condition is entire, a license to dispense with a part of the condition is a dispensation of the whole. Thus, where a lease was made to three, on condition that neither they, nor any of them, should alien without license of the lessor, and the one by license aliened his part, and afterwards the

(*a*) Doe d. Wilson *v.* Phillips, 2 Bing. 13.
(*b*) For covenants upon which the assignee of a reversion may sue, *vide ante*, 53.
(*c*) Dumpor's case, 4 Co. 120, (*b*).
(*d*) Threr *v.* Barton, Moore, 94; Webb *v.* Russell, 3 T. R. 393, 402.
(*e*) Fenn d. Matthews v. Smart, 12 East, 444.
(*g*) Dumpor *v.* Syms, Cro. Eliz. 815; S. C., 4 Co. 119, (*b*).

other two without license aliened their parts, it was adjudged the lessor could not enter, for the condition was dispensed with.(*a*) So, likewise, where the lease contains a clause, that the lessee shall not assign without leave from his lessor, the lessee, under a license to assign part of the premises, may assign the whole without incurring a forfeiture. [*191] But the license must be such as is required by the *lease; and therefore, where the lease required the license to be in writing, a parol license was held to be insufficient.(*b*)

Provisoes for re-entry are also construed strictly with respect to the parties who may take advantage of them, and only include the persons who are expressly named. Thus, a power for C. to enter will not extend to his executor. And it seems also, that if a lessee covenant with his lessor that *he* will not assign, &c., a covenant so framed will not extend to his executors or administrators, although if the executors or administrators be mentioned in the clause, they will be bound by it.(*c*)

*So also, where a lease contained a covenant, that the lessee, his executors or administrators, (without mentioning *assigns*), should not underlet, and the lessee become bankrupt, and his assignees assigned the premises to a third person, who re-assigned to the bankrupt, (having obtained his certificate,) who under-let them; it was held that the lessee having been discharged of all his covenants by his bankruptcy, the under-letting by him was in the character of assignee, and, therefore, no forfeiture of the lease.(*d*)

When a power of re-entry for breach of covenants is reserved, and a lease and the possession descends to co-parceners at common law, it seems that one alone cannot maintain ejectment for breach of the covenant.(*e*)

Where directors of a joint stock company granted a lease, with a power of re-entry, and subsequently the company was incorporated by an Act of Parliament, enacting, "that all contracts, &c., theretofore entered into with the directors of the company, should be as valid and

(*a*) Dumpor v. Syms, Cro. Eliz. 815; S. C., 4 Co. 119, (*b*).
(*b*) Roe d. Gregson *v.* Harrison, 2 T. R. 425; Seers *v.* Hind, 1 Ves. jun. 294.
(*c*) Hassel d. Hodson v. Gowthwaite, Willes, 500.
(*d*) Doe d. Chere v. Smith, 1 Mars. 359.
(*e*) Doe d. De Rutzen *v.* Lewis, 5 Ad. & Ell. 277.

effectual to all intents and purposes, as if the company had been incorporated, when the same contracts, &c., were entered into, and, as if the same had been entered into by the incorporated company;" it was held that the right of re-entry was transferred to the incorporated company.(*a*)

A power of re-entry cannot be reserved to a stranger;(*b*) and where, in a building lease, a trustee and his *cestui que trust* were both demising *parties, and the power of re-entry was reserv- [*192] ed to both, and the state of the title appeared in the recitals in the lease, the court, without argument, held the proviso to be void.(*c*)

*So, where a lease was made by a mortgagee, and the executrix of a mortgagor, and the mortgagee demised, and the executrix demised and confirmed, and a right of entry for a breach of covenants was reserved "to them or either of them," it was held, that this lease operated as the demise of the mortgagee, and the confirmation of the executrix, and that the right of re-entry, under the proviso, enured to the morgagee only.(*d*)

So also, where a leasehold was bequeathed to A. in trust, to permit or suffer B. to take the rents during her life, and on her death to sell and divide the produce between C. and D., and A., B., and C. joined in a lease to D., of the residue of the term, with a right of re-entry reserved to A. B., and C., and the survivors of them; it was held that B. could not take advantage after A.'s death of the right of entry, she being a stranger to the legal estate.(*e*)

But where a lessee made an under lease, containing a proviso that the lessor *and* lessee might re-enter for breach of covenant, it was held that the lessee might *alone* maintain ejectment without joining the lessor.(*g*)

And where a party, being possessed of a term of years, demised his whole interest, subject to a right of re-entry on the breach of a condi-

(*a*) Doe d. London Dock Comp. *v.* Knebell, 2 M. & Rob. 66.
(*b*) Co. Litt. 214.
(*c*) Doe d. Barber *v.* Lawrence, 4 Taunt. 23.
(*d*) Doe d. Barney v. Adams, 2 Tyr. 289.
(*e*) Doe d. Parker *v.* Goldsmith, 2 Tyr. 710.
(*g*) Doe d. Bedford v. Wheeler, 4 Bing. 276.

tion, it was held that he might enter for condition broken, although he had no reversion.(*a*)

The forfeiture of a lease, by breach of a covenant or condition, may be waived, in like manner as a forfeiture for non-payment of rent, or a notice to quit; that is to say, if the landlord do any act, with knowledge of the breach which can be considered as an acknowledgment of a tenancy still subsisting.[1]

*Thus, for example, if he receives rent, accruing subsequently [*193] to the forfeiture,(*b*) unaccompained *by circumstances which show a contrary intention.(*c*) It seems also, that an absolute unqualified demand for rent will of itself be sufficient, although the rent should not be paid,(*d*) and it has been ruled, at Nisi Prius, that a notice to quit will operate as a waiver of a forfeiture for non-repair until after its expiration.(*e*) Acceptance also of rent accruing, due after the lessee has been discharged, under the Insolvant Debtors' Act, has been held a waiver of a forfeiture, accruing by reason of his previous insolvency,(*g*) and although it cannot be correctly termed a waiver of a forfeiture, it has been holden, that a lessor cannot take advantage of a forfeiture against a person, who has purchased the lease subsequent to the breach, under the lessor's advice.(*h*)

But a waiver of one forfeiture incurred, by breach of covenant, will not be a waiver of a second forfeiture incurred by another breach of the same covenant; nor where the breach is a *continuing* breach, will the landlord be precluded from taking advantage of it, by having re-

(*a*) Doe d. Freeman v. Bateman, 2 B. & A. 158.

(*b*) Fox *v.* Swan, Styles, 482; Goodright d. Walter *v.* Davids, Cowp. 803; Doe d. Griffith *v.* Pritchard, 5 B. & Ad. 765.

(*c*) *Ante*, 111.

(*d*) Doe d. Nash *v.* Birch, 1 M. & W. 402.

(*e*) Doe d. Scott *v.* Miller, 2 C. & P. 348. The authority of this case, as reported, may be doubtful.

(*g*) Doe d. Gatehouse *v.* Rees, 4 Bing. N. C. 384.

(*h*) Doe d. Sore *v.* Eykins, 1 C. & P. 154; S. C., 1 R. & M. 29.

[1] Where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant, and the premises being out of repair, the landlord gave notice to repair within three months: held, that this was a waiver of the forfeiture incurred by breach of the general covenants to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months. Doe ex dem. Morecraft et al. *v.* Meux et al., 4 Barn. & Cress. Rep. 606.

ceived rent, &c., after the breach was originally committed. Thus where a right of re-entry was reserved on a breach of covenant not to under-let, it was held that the lessor was entitled to re-enter upon a second underletting, although he had waived his right so to do upon the first. So also, where the forfeiture incurred was by using rooms in a house, in a manner prohibited by the lease, it was held that such user was a continuing breach, and that the landlord might recover, after receiving rent, provided the user continued after such receipt. So also, where a lease of coal mines reserved a certain rent, and contained a proviso that the *lease should be void, if the tenant should cease working, at any time, two years, and the tenant did cease working two years, *and then paid rent, but did not resume the [*194] working; it was held that this was a continuing breach, and that ejectment might be maintained, for the ceasing to work after the payment of the rent.(*a*) So also, a proviso for re-entry, "in case the tenant shall become a bankrupt, or be insolvent," means, as to the latter clause, a general inability to pay debts, and not taking the benefit of the Insolvent Debtors' Act, and such inability will be a continuing breach, until the party shall be discharged of his debts by that Act.(*b*) The breach of a covenant also "to insure, and keep insured, the demised premises during the term," is a continuing breach for such portion of time at they shall remain uninsured.(*c*)

But in a case where a lease contained a covenant to repair, with a right of re-entry, in case the lessee should not repair within three months after notice, and the landlord gave notice, and, after the three months had expired, received rent accruing after such expiration, and then brought an ejectment, the premises continuing out of repair, and the jury found a verdict for the defendant, the Court of King's Bench refused to set the verdict aside, notwithstanding the opinion of Lord Kenyon, as expressed on the trial, that the forfeiture had not been waived. And it seems the jury were right, for the power to re-enter was not given for breach of the general covenant to repair, but "in case the lessee should not repair within three months after notice;" the receipt of rent, therefore, after the expiration of the notice to repair was a waiver of that notice, and, consequently, a fresh notice was necessary to bring the party within the penalty of the proviso.(*d*)

(*a*) Doe d. Bryan *v.* Banks, 4 B. & A. 401.
(*b*) Doe d. Gatehouse v. Rees, 4 Bing. N. C. 384, and the cases there cited.
(*c*) Doe d. Flower *v.* Peck, 1 B. & Ad. 428.
(*d*) Fryett d. Harris *v.* Jeffreys, 1 Esp. 393.

*Where the defendant, being the mortgagee of a term, purchased the mortgagor's whole interest in the premises, in consequence of the lessor's advice, "to take to the premises, and finish the buildings," given after a right of re-entry had accrued for the non-completion
[*195] of the buildings; it was held, that the *lessor's right of re-entry was not thereby waived, but suspended only for such reasonable time after the purchase, as might be required to complete the buildings, and that ejectment might be maintained for the forfeiture after that time had elapsed, against the purchaser, who had proceeded in part to finish, but had never wholly completed the buildings, or put them in a habitable state.(a)

A lease contained a covenant by the lessee, to insure in the joint names of himself and the lessor, and in two-thirds of the value of the premises. Both parts of the lease continued in the possession of the lessor, and an abstract only was delivered to the lessee, in which it was stated, that the tenant was to insure in two-thirds of the value, but it was not stated in whose names the policy was to be effected. The lessee insured in his own name only, and to a less amount than two-thirds, but to the same amount as the lessor had himself insured the premises during two years of the lease, when the lessee had been in embarrassed circumstances. Lord Tenterden, C. J., ruled that although there was no dispensation or release from the covenant, yet that if the conduct of the lessor had been such as to induce a cautious man to believe, that he would do all that was required of him, by insuring in his own name, and to the amount proved, he could not pro-
[*196] ceed against his lessee for a forfeiture; and *he left to the consideration of the jury, the question whether such had been the conduct of the lessor; the jury found a verdict for the defendant.(b)

†A landlord will not lose his right to re-enter, by merely lying by, (however long the period), and witnessing the act of forfeiture; but it seems, that if, with full knowledge thereof, he permits the tenant to expend money in improvements, it is a circumstance from which the jury may presume a waiver, as well as ground for application to a Court of Equity for relief.(c)

(a) Doe d. Sore *v.* Ekins, 1 R. & M. 29; S. C., 1 C. & P. 154.
(b) Doe d. Knight *v.* Rowe, 1 R. & M. 343.
(c) Doe d. Sheppard *v.* Allen, 3 Taunt. 78.

It seems scarcely necessary to observe, that no act of the landlord will operate as a confirmation of a lease, rendered voidable by a breach of covenant, unless he had full notice, at the time of such act, that the forfeiture had been committed.(*a*)

Before quitting this branch of our subject, it is necessary to notice a material distinction which prevails between leases for *lives* and leases for *years*, as to the consequences of a forfeiture upon the breach of a condition, where the lease is declared "*to be null and void*," or, "*to cease and determine*," &c., upon the breach of the condition, instead of being expressed in the cemmon form, "*that it shall and may be lawful for the lessor, in such case, to re-enter.*" In leases for lives, whatever may be the *words of the condition, it is in all cases held, [*197] that if the tenant be guilty of any breach of it, the lease is voidable only, and not void; and therefore not determined until the lessor re-enters. Because when an estate commences *by livery*, it cannot be determined before *entry;* and consequently, if the lessor do any act which amounts to a dispensation of the breach, the lease, which before was voidable only, is thereby affirmed, and the forfeiture waived. But when a condition of the import of those first above-mentioned is inserted in a lease for years, if the lessee be guilty of *any breach of it, the lease becomes absolutely void, and determined thereby; and cannot be again set up by any subsequent act of the lessor. But if the condition be "*that it shall and may be lawful for the lessor to re-enter*," or "*that the terms shall cease and determine, if the lessor please*,"(*b*) or the like, the lease will be only voidable by a breach of the condition; and the forfeiture may be waived by a subsequent acknowledgment of a tenancy, in the same manner as in all cases of leases for lives.(*c*)[1]

These distinctions, however, do not exist when the forfeiture accrues by reason of non-performance of a covenant, instead of the breach of a condition. In all cases of this nature, whatever may be the words of the proviso, leases for lives and leases for years are governed by

(*a*) Roe d. Gregson *v.* Harrison, 2 T. R. 425.
(*b*) Doe d. Bristow *v.* Old, K. B. Sittings after T. T. 1814, MS.
(*c*) Co. Litt. 215,(*a*); Pennant's case, 3 Co. 64, 65.

[1] Where there is a forfeiture of an estate of freehold upon condition, for non-payment of an annuity, if the grantor subsequently accept the sum due, such acceptance is in law a waiver of the forfeiture; and a forfeiture, once waived, can never afterwards be claimed. Chalker *v.* Chalker, 1 Conn. Rep. 79.

[*198] the same principles, and a forfeiture *may be enforced, or the lease confirmed, at the option of the lessor.(*a*)

A proviso in a lease to re-enter for a condition broken, operates only during the term, and cannot be taken advantage of after its expiration. Thus, where a lease for ninety-nine years, if A. and B. should so long live, was granted, with a proviso, giving the power of re-entry, in case the lessee should under-let the premises for the purpose of tillage, and an under-tenant of the lessee ploughed up and sowed the land, but the lessor did not enter during the continuance of the estate; it was held in an action of trespass by the lessor against the under-tenant, for entering upon the land, after the determination of the estate, for the purpose of carrying off the emblements, that the plaintiff having never been in possession **by right of re-entry* for condition broken, could have no advantage thereof, and that the defendant, who ploughed and sowed the land, was entitled to take the emblements.(*b*)

The Courts of Common Law have no power to stay proceedings in ejectment on a forfeiture by breach of covenant to repair, or indeed by the breach of any other covenant except a covenant for the payment of rent; and the rule in equity is, that relief will only be granted in those cases in which the forfeiture is incurred by the non-payment of a sum of money, so that payment of that sum with interest is a complete compensation, and will put the party in the same situation as if there had been no breach; but that relief will not be granted (unless perhaps in the case of unavoidable ignorance or accident) in respect of covenants for repairing, insuring, or doing any specific acts, where the compensation must be estimated in damages.(*c*)

(*a*) Rede *v.* Farr, 6 M. & S. 121; Doe d. Bryan *v.* Bancks, 4 B. & A. 401; Arnsby *v.* Woodward, 6 B. & C. 519; Doe d. Nash v. Birch, 1 M. & W. 402.

(*b*) Johns *v.* Whitley, 3 Wils. 127.

(*c*) Doe d. Mayhew *v.* Asby, 10 Ad. & Ell. 71; Hill *v.* Barclay, 18 Ves. jun. 63; Reynolds *v.* Pitt, 19 Ves. jun. 134; *ex parte* Vaughan, 1 Turn. & Russ. 435; Green *v.* Bridges, 4 Sim. 100; Harris *v.* Bryant, 4 Russ. 91.

*CHAPTER V.

Of the Ancient Practice: and the Cases in which it is still necessary.

When the remedy by ejectment is pursued in an inferior court, the fictions of the modern system are inapplicable, for inferior courts have not the power of framing rules for confessing lease, entry, and ouster, nor the means, if such rules were entered into, of enforcing obedience to them. When, also, the premises are vacated, and wholly deserted by the tenant, and his place of residence is unknown, the modern practice, which requires an affidavit of the service of a declaration in ejectment upon the tenant in possession, before judgment can be obtained against *the casual ejector, cannot be adopted. But [*200] strict proof of these facts will be required, and if it appear that the premises were not *wholly* deserted, or that the plaintiff's lessor knew *where the tenant lived*, a judgment obtained by means of the ancient practice will be set aside.(*a*) [1]

When, therefore, the party brings his action in a superior court, the possession being vacant,(*b*) and the lessor's abode unknown, and when he is desirous of trying his title in a court of inferior jurisdiction, (but in these cases only,) all the forms of the ancient practice must be observed; a lease must be sealed upon the premises; an ouster actually made; and the parties to the suit will be real, and not imaginary persons.

The proceedings are as follows: A., the party claiming title, †enters upon the land before the first day of the term of which the declaration is to be entitled, either in person or by attorney ;(*c*) and whilst on the

(*a*) Savage *v.* Dent, Stran. 1064; Jones d. Griffiths *v.* March, 4 T. R. 464.

(*b*) Appendix, No. 7.

(*c*) If it be necessary to join the wife in the demise, the lease must be executed by the parties, in their proper persons, because a *feme covert* cannot constitute an attorney; Wilson *v.* Rich, 1 Yelv. 1; S. C., 1 Brown, 134; Plomer *v.* Hockhead, 2 Brown, 248; S. C., Noy. 133; *sed vide* Hopkins's case, Cro. Car. 165; Gardiner *v.* Norman, Cro. Jac. 617.

[1] The principles, as to the proceedings for a vacant possession in England, do not apply to unsettled lands in this country. Saltonstall *v.* White, 1 Johns. Cas. 221; S. C., Cole. Cas. 86.

premises, execute a lease of them to B., (any person(*a*) who may accompany him,) and delivers to him the possession by some one of the common modes. C. (some other person) then enters upon the premises and ejects B. therefrom, and having done so, remains upon them whilst B. delivers to him a declaration in ejectment, founded upon the demise contained in the lease, and in all respects like the declaration in the modern proceedings,(*b*) except that the parties to it are real instead of fictitious persons; B. being made the plaintiff, A. the lessor, and C. the defendant. To this declaration a notice is added, signed by B.'s attorney, and addressed to C., requiring him to appear and plead
[*201] *to the declaration, and informing him that if he do not, judgment will be signed against him by default.(*c*)

The suit then proceeds as against the casual ejector, and if the action be brought in a superior court, no person claiming title will be admitted as defendant in his stead. Assuming, therefore, the right to the premises to be disputed, the party sealing the lease must, in the first instance, recover the possession, and the party claiming title must afterwards bring a common ejectment against him to try his right.(*d*)

When the proceedings are in the Queen's Bench, judgment *is moved for against the defendant, upon an affidavit(*e*) of the sealing of
[*202] the lease, *ouster of the plaintiff, &c., as in a common ejectment,(*g*) and unless he appears and pleads, judgment will be signed against him accordingly. In the Common Pleas, a rule to plead must be given on the first day of Term, as in other actions, and judgment signed at the expiration of the rule.(*h*)

It is immaterial, as far as the forms of sealing the lease, &c., are concerned, whether the action be commenced in a superior or inferior court: but the subsequent proceedings in inferior courts must of course depend upon the general practice in them in other actions, and

(*a*) Attorneys form an exception to this statement; for by the rules of B. R. and C. B. (M. T. 1654,) it is ordered, "that for the prevention and maintenance and brocage, no attorney shall be lessee in an ejectment."

(*b*) Appendix, No. 12.

(*c*) Appendix, No. 8.

(*d*) *Ex parte* Beauchamp and Burt, Barn. 177, B. N. P. 96.

(*e*) Appendix, No. 9.

(*g*) Smartley *v.* Henden, 1 Salk. 255, 2 Sell. Prac. 131.

(*h*) 2 Sell. Prac. 131.

cannot form a part of this Treatise. How far it may even be *necessary* to give the tenant in possession notice of the claimant's proceedings, in an ejectment brought in an inferior court, may appear doubtful, when it is remembered, that such notice was only requisite in the superior courts, in consequence of a rule made for that particular purpose ;(*a*) but it certainly is more *prudent* to conform to the general practice in this respect, and the notice need not to be given until after the entry, and execution of the lease.(*b*)

The defendant is entitled to remove an ejectment *from an [*263] inferior to a superior court, either by writ of *certiorari*,(*c*) or *habeas corpus* ;(*d*) [1] and when removed, the tenant in possession is entitled to the same privilege of confessing lease, entry, and ouster, and defending the action, as if the plaintiff had originally declared in the superior court.(*e*) The superior court also will not grant a *procedendo* when a cause has been so removed, if there be reason for believing that an impartial trial cannot be had in the inferior court, or upon other special grounds ; and it is to be inferred from the reasoning of the judges in the only modern case upon the subject, that a writ of *certiorari* is a matter of course, and that a *procedendo* will in no case be granted.(*g*)

When the lands lie partly within, and partly without, the jurisdiction of the inferior court, the defendant cannot plead above the jurisdiction of such inferior court, because the demise is transitory, and may be tried anywhere.(*h*)

As the plaintiff, in the ancient practice, is a person actually in existence, his death would of course abate the action, according to the gene-

(*a*) Ante, 11.
(*b*) 1 Lill. Pr. Reg. 675.
(*c*) Doe d. Sadler *v.* Dring, 1 B. & C. 253.
(*d*) Highmore *v.* Barlow, Barn. 421 ; Allen *v.* Foreman, 1 Sid. 313, but a judgment in ejectment is not within the meaning of 19 Geo. III. c. 70, s. 11 ; Doe d. Stanfield *v.* Shipley, 2 Dow. P. C. 408.
(*e*) Gilb. Eject. 37.
(*g*) Patterson d. Gradridge *v.* Eades, 3 B. & C. 550.
(*h*) Hall *v.* Hughes, 2 Keb. 69.

[1] An ejectment brought in an inferior court, on a lease executed and sealed on the premises, which were within the jurisdiction of that court, may be removed into this court, by *certiorari*, if there be any ground for believing that it cannot be impartially tried in the inferior court. Patterson ex dem. Gradridge et al. *v.* Eades, 3 Barn. & Cress. 550.

ral rules of law; but as the courts look upon the lessor of the plaintiff to be the person concerned in interest, they will not suffer him to be deprived of his remedy, by such an event. If, therefore, there be any one of the same name with the plaintiff, he will be presumed [*204] to have been *the person; and it has also been held to be a contempt of the court, to assign for error the nominal plaintiff's death.(*a*)

In like manner, before the introduction of the modern practice, it was said, that if the plaintiff released to one of the tenants in possession, who had been made defendant, such release would be a good bar,[1] because the plaintiff could not recover against his own release, since he was the plaintiff upon the record; but the Courts considered such a release as a contempt, and it does not appear that a plea of this nature ever occurred in practice.(*b*)

*The casual ejector is also in the ancient practice a real person, but the Court will not allow him to confess judgment; and where, upon proceedings on a vacant possession, the casual ejector gave a warrant of attorney for this purpose, the Court set the judgment aside.(*c*)

Where an action of ejectment, and an action of assault and battery, were joined in the same writ, after verdict, it was moved in arrest of judgment, because it was without precedent; but the Court seemed to think the misjoinder cured by the verdict.(*d*)

(*a*) Addison *v.* Sir John Otway, 1 Mod. 250, 52; Moore *v.* Goodright, Stran. 899.

(*b*) Peto *v.* Checy, 2 Brown, 128; Anon., Salk. 260; *vide* Doe d. Byne *v.* Brewer, 4 M. & S. 300.

(*c*) Hooper *v.* Dale, Stran. 531.

(*d*) Bird *v.* Snell, Hob. 249; *et vide*, Gilb. Eject. 52.

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[1] A release by one of two lessors of the plaintiff, is no bar to a recovery in an action of ejectment, such release affecting only the quantum of interest. A release by a sole lessor is a bar here, though held otherwise in England. Jackson ex dem. Hallenbeck et al. *v.* M'Claskky, 2 Wen. Rep. 541.

A conveyance by the plaintiff's lessor, during the dependency of an action of ejectment, can operate only upon his reversionary interest, and cannot extinguish the prior lease. The existence of such lease is a fiction, but is upheld for the purpose of justice. If it expire during the pending of a suit, the plaintiff cannot recover his term at law, without procuring an enlargement of it by the court; and can proceed only for antecedent damages. Robinson *v.* Campbell, 3 Wheat. Rep. 212.

*CHAPTER VI.

Of the declaration in the modern action of ejectment, and notice to appear.

THE practical proceedings in the modern action of ejectment vary from the proceedings in all other actions. *The suit is [*206] commenced by the delivery of the declaration against the casual ejector, to the tenant in possession;[1] for, as the plaintiff and defendant are only fictitious persons, the suing out of a writ would be an useless form. This declaration is, in fact, in itself, a kind of writ or process, and is so considered by the Courts; and it is the only means by which the party in possession is informed of the claim set up by the lessor, and required to appear and defend his title.(*a*)

OF THE DECLARATION.

We must now consider in their order—Firstly, the several requisites of the declaration. Secondly, the amending the declaration. Thirdly, the notice to appear.

The rules of Michaelmas Term, 3 Wm. IV., being rules "agreed upon by the Judges in pursuance of the stat. 2 Wm. IV. c. 39," which relate to *personal* actions only, do not extend to the action of ejectment, which is a *mixed* action, and therefore the old forms of intituling and commencing the declaration should be observed.(*b*)

(*a*) Rex *v.* Unitt, Stran. 567.

(*b*) Doe d. Fry *v.* Roe, 3 M. & Scott, 370; Doe d. Evans *v.* Roe, 1 Ad. & Ell. 11; Doe d. Gillett *v.* Roe, 2 Dow. P. C. 690.

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[1] A declaration in ejectment is so far considered a process of the court, that the court will punish as a contempt any improper conduct of the tenant at the time of its delivery. Rex *v.* Unitt, Stran. 567.

Ejectment, commenced by service of the declaration. Baron *v.* Abeel, 3 Johns. 481.

Ejectment against a corporation is by summons, and not declaration. Brown *v.* Syracuse R. R., 5 Hill's Rep. 554.

In Kentucky, the service of notice in ejectment is the commencement of the action. Pindell *v.* Maydwell, 7 B. Mon. Rep. 314. But see Breeding *v.* Taylor, 6 B. Mon. Rep. 62. In Tennessee, the writ must not only be served, but a copy of the declaration also. Cravins v. Armour, 6 Yerger, 467.

OF ENTITLING THE DECLARATION.

[*207] *The declaration should regularly be entitled of the Term *immediately preceding the Vacation in which it is delivered; but if it should be entitled of a wrong Term, or a Term not arrived,(*a*) or not of any Term, it seems from the majority of the cases to be immaterial, provided the notice to appear at the foot of the declaration was sufficient to give the tenant due warning of the time for his appearance.[1]

Thus declarations have been upheld, entitled Michaelmas Term, "54 Geo. III.," instead of "55 Geo. III.";(*b*) Trinity Term, "56 Geo. III.," instead of "55 Geo. III.";(*c*) Michaelmas Term, "8 Wm. IV.," instead of "7 Wm. IV.," Trinity Term "6 Wm. IV.," instead of "5 Wm. IV."(*b*) "Hilary" instead of "Michaelmas" Term,(*d*) and "Michaelmas" instead of "Easter" Term,(*e*) the notices to appear being correct, and the declarations delivered at the proper times. So, also, "In the Common Pleas, June 12, 1834;"(*g*) and where the declaration was delivered before the first day of "Hilary" Term, and the notice at its foot was dated "January 1, 1818," and was to appear within the four first days of the next Term, it was held sufficiently certain, although not entitled at all.(*h*)

(*a*) Doe d. Gore *v.* Ross, 3 Dow. P. C. 5; Doe d. Willes *v.* Roe, 5 Dow. P. C. 380; Doe *v.* Roe, 2 Dow. P. C. 186; Doe d. Smithers *v.* Roe, 4 Dow. P. C. 374; Doe d. Brook *v.* Roe, 9 Dow. P. C. 347; Doe d. Evans *v.* Roe, 5 Dow. P. C. 508; Doe d. Crooks *v.* Roe, 6 Dow. P. C. 184.

(*b*) Goodtitle d. Ranger *v.* Roe, 2 Chitty, 172.

(*c*) Doe *v.* Greaves, 2 Chitty, 172.

(*d*) Anon., 2 Chitty, 172.

(*e*) Anon., 2 Chitty, 173.

(*g*) Doe d. Ashman *v.* Roe, 1 Bing. N. C., 253.

(*h*) Goodtitle d. Price *v.* Badtitle, H. T. 1818, C. B., MS.

[1] The entitling the declaration in ejectment is a mere matter of form, and it is good though of a term after its service. Jackson *v.* Stiles, 6 Cowen, 597; Deen *v.* Snowhill, 1 Green's Rep. 23; Den *v.* M'Shane, Ib., 35. So, though it be without any title at all. Ib.

The declaration must be filed and entered in the records of the court, at the term the tenant is warned to appear, or the case is not in court. Sliger *v.* Grants, 7 Monroe's Rep. 406.

Notice to appear at the term next after the term succeeding the time of notice, in the state of Indiana, is illegal. Jackson *v.* Goodtitle, 7 Blackf. Rep. 129.

On the contrary, a declaration entitled Trinity Term, "4th Vict." instead of "3rd Vict." has been held insufficient, although it was sworn that the service was effected on the 29th of October, with notice to appear in the next Michaelmas Term.(*a*) So, also, a declaration entitled "6 Wm. IV." instead *of "7 Wm. IV."(*b*) So, also, a declaration entitled "Michaelmas Term, 1840," with a notice to appear in "next Michaelmas Term," and which declaration was served before the commencement of the Term, on which occasion the tenant said, he knew no step could be taken until March.(*c*)

If the declaration be irregularly entitled, and the notice to appear does not demonstrate the time for appearance with sufficient certainty, as where the declaration was entitled of a Term not arrived, and there was no date to the notice,(*d*) it seems, upon principle, that such declaration ought not to be supported; but it has been ruled both ways.(*d*)

The omission of the name of the Court on intituling the declaration is immaterial, if the notice at the foot gives the required information;(*e*) it is also immaterial whether the declaration be filled in with the name of the casual ejector or the tenant in possession, except that in the latter case the Court will not give a rule absolute for judgment in the first instance.(*g*)

With the exception of cases in which the ejectment is founded upon the provisions of the stat. 1 Wm. IV. c. 70, s. 36, when the declaration must be specially entitled of the day next after the day of the demise, whether the same shall be in Term or Vacation, the declaration may be entitled of a Term anterior to such demise, that is to say (inasmuch as the demise is the title upon which the plaintiff is supposed to enter, and the ouster the supposed wrong for which the action is †brought,) the declaration may be entitled antecedently to the cause of action. This anomaly springs out of the fictitious nature of the proceedings, and the control which the Courts exercise over them. *If [*208]

(*a*) Doe d. Vincent *v.* Roe, 9 Dow. P. C. 43; Doe d. Pearson *v.* Roe, 1 Wol. P. C. 58; Doe d. Rogers *v.* Roe, 2 Dow. N. S. 392.

(*b*) Doe d. Gowland *v.* Roe, 5 Dow. P. C. 273.

(*c*) Doe d. Channell *v.* Roe, 9 Dow. P. C. 67.

(*d*) Doe d. Giles *v.* Roe, 7 Dow. P. C. 579; Doe d. Newman *v.* Roe, 9 Dow. P. C. 131; *per contra*, Anon., 2 Chitty, 172; Doe d. Green *v.* Roe, 8 Scott, 385.

(*e*) Doe d. Tattersall *v.* Roe, 8 Dow. P. C. 612.

(*g*) Doe d. Dickenson *v.* Roe, 9 Dow. 363.

the tenant appear, according to the requisition of the notice, and apply to be admitted a defendant, instead of the casual ejector, he will be compelled by the consent rule to accept a declaration, as will be explained hereafter,(*a*) entitled of a subsequent Term; and if he leave the suit undefended, judgment will, as of course, be taken out against the casual ejector.(*b*)

Although the rules of Michaelmas Term, 3 & 4 Wm., IV. do not apply to actions of ejectment, the omission, when the action is in the Exchequer, of the statement that the plaintiff is indebted to our Lady the Queen and of the *quo minus* is immaterial.(*c*)

OF THE VENUE.

[*209] *The *venue* in ejectment is local, and must be laid in the county in which the lands are situated ;(*d*)[1] and if it appears, on the trial, that they are situated in a different county from that stated in the declaration, the plaintiff will be non-suited. But if the venue stated in the body of the declaration be correct, it has been holden by Patteson, J., that a mistake in the *venue* in the margin is unimportant.(*e*)

OF THE DEMISE.

There is no limitation to the number of demises which may be inserted in the declaration in ejectment, but it must be remembered that it is not the claimant, but the nominal plaintiff who is the plaintiff upon the record; and therefore, although *the lessors may have separate interests, they cannot be separately heard at the trial.(*g*)

The demise declared upon, must be consistent with the title of the of the lessor; that is to say, such a demise must be supposed to be made, as would, if actually made, have transferred the right of posses-

(*a*) Post, Chap. 8.
(*b*) Imp. K. B. 642; 1 Lil. Prac. Reg. 680 : Tunstall *v.* Brend, 2 Vent. 174.
(*c*) Doe d. Bloxam *v.* Roe, 6 Dow. P. C. 388.
(*d*) Anon. 6 Mod. 222; Mostyn *v.* Fabrigas, Cowp. 161, 176.
(*e*) Doe d. Goodwin *v.* Roe, 3 Dow. P. C. 323.
(*g*) Doe d. Fox *v.* Bromley, 6 D. & R. 292.

[1] See Bellas *v.* Hontz, 8 Watts. 373. In New Jersey, the venue in an action of ejectment may be changed. Meldrum *v.* Jarvis, Coxe Rep. 203.

sion to the lessee.[1] Thus, if there be several lessors, and a joint demise by them all be alleged, such a title must be shown, as would

[1] "Although the demise is a fiction, still the fiction must be such as might, by possibility, have been true: the lessor is supposed to have been capable of making a demise not only at the time when the demise is alleged to have been made, but when the suit was brought." Per Sutherland, J., delivering the opinion of the court. Doe ex dem. Harston et al. *v.* Butler, 3 Wen. 154; Lessee of Binney *v.* The Chesapeake and Ohio Canal Co., 8 Peters' Rep. 214; Coxe *v.* Jorrier, 3 Bibb. 297; Wood *v.* Grundy, 3 Har. & John. 13; Duval *v.* Bibb, 3 Call. 362; Den *v.* M'Shane, 1 Green, 35.

Aliens authorized by statute to hold lands, though not allowed to lease or demise the same, are not precluded from making a demise for the purpose of bringing an ejectment. Ellice *v.* Britton, 4 Wen. 507.

Where there are two demises, one in the name of the grantor, and the other in the name of the grantee of the premises, and, at the time of the conveyance to the grantee, the premises are held adversely, so as to render the conveyance inoperative, the recovery may be in the name of the grantor. Jackson *v.* Leggett, 7 Wen. 377.

Although, in New York, the use of the names of any other than the real claimants is abolished, still, counts may be inserted in the name of both grantor and grantee, where the objection of adverse possession, at the time of the conveyance to the grantee, is anticipated. Ely *v.* Ballantine, 7 Wen. 470.

It is no objection to a recovery, that the title, as proved on the trial, varies from that set up in the declaration. Bear *v.* Snyder, 11 Wen. 592.

A description of the premises claimed, setting them forth as one undivided third part of all that part of a certain lot in a certain township, of which the defendant is in possession under a purchase at a sheriff's sale, in execution against A. B., is sufficiently certain; and a further specification of the premises, by reference to a record of partition in a public office, does not hurt the declaration. Ib.

A *prochein ami* cannot make a devise. Lessee of Mursie's heirs *v.* Long, Ohio Con. Rep. 364.

The plaintiff must set forth a lease which might by possibility be a good subsisting lease at the time of the supposed date or making of the lease, at the time of the ouster, and at the time of bringing the action. Bates ex dem. Shattuck *v.* Tucker, Chipman's Rep. 69.

If the fiction of a lease potentially cease, or a fact arise which destroys the possibility of such lease, or destroys its effect, if supposed once to have existed, there can be no recovery. Norton ex dem. Douglas *v.* Spooner, Chipman's Rep. 74.

The plaintiff cannot recover under a demise from a lessor who has released his interest to the defendant. Jackson ex dem. Bonnel et al. *v.* Foster, 12 Johns. Rep. 488.

For a person, owning the exclusive title to lands, to unite with himself in a joint demise in ejectment, is error. Adams *v.* Turner, 7 Hammond, 136.

If the plaintiff in ejectment declare on a lease, and prove a title in fee, he cannot recover. Douglas *v.* Spooner, Chipman's Rep. 74.

A demise, in a declaration of ejectment, laid from a man who was dead at the commencement of the suit, may be objected to at the trial, and is cause of non-suit. A lessor must be capable of making a demise, not only at the time alleged in the declaration, but also when the suit is commenced. Doe ex dem. Marston *v.* Butler, 3 Wen. 149; Baylor *v.* Neff, 3 M'Lean, 302.

There cannot be a recovery in ejectment on the demise of a man dead before service o declaration and notice. Elliott *v.* Bohannon, 5 Mon. Rep. 121.

enable each of them to demise the whole; because if any one of the lessors have not a legal interest in the whole premises, he cannot in

Where a joint demise is laid in the names of several lessors, it must be proved as laid; and, unless it be shown that the lessors had such an interest as would enable them to join in a demise, the plaintiff will be non-suited. Ib.; South *v.* Mahan, 7 Monroe's Rep. 230.

See Larue *v.* Slack, 4 Bibb. 358; Skyle *v.* King, 2 A. K. Marsh. 385; Courtney *v.* Shropshire, 3 Litt. 265.

On a joint demise, the title must be joint, or the plaintiffs cannot recover. Taylor et al. *v.* Taylor et al., 3 Marsh. Rep. (Ky.) 19; Taylor *v.* Whiting's heirs, 4 Monroe's Rep. 365.

An ejectment cannot be maintained on a joint demise by the husband and wife, when the title is in the husband alone. Tucker et ux. *v.* Vance, 2 Marsh. Rep. (Ky.) 457.

Husband may demise such an interest in the land of his wife as will maintain ejectment. Chambers *v.* Hanley's heirs, 3 Marsh. Rep. 98, (new series;) Griffith *v.* Huston, 7 Ib. 385.

In ejectment, where the plaintiff declares on separate demises by two, each for a moiety, and fails to prove title in one of the moieties, he may, nevertheless, recover, according to the title proved in the other lessor. Allen, &c, *v.* Trimble, &c., 4 Bibb's Rep. 21; Jackson *v.* Sidney, 12 Johns. 185; Magruder *v.* Peter, 4 Gill & Johns. 323.

After issue joined upon the title in ejectment, no exception can be taken to the form of the declaration. Rees *v.* Middleton, 1 Marsh. Rep. (Ky.) 6.

In ejectment, the court are bound to take notice of the real parties litigating. Lessee of Campbell *v.* Sproat, 1 Yeates' Rep. 20.

If the lease in a declaration of ejectment is stated to have been made on the 7th of July, 1825, to hold from the 6th of July, then last past, it must be construed to mean the 6th day of July, 1825, and not the 6th day of July, 1824, which was prior to the accrual of the plaintiff's title; for, where the words may be rendered either way, that construction must be adopted which will render the fictitious demise useful to the action, rather than that which would destroy it. Den. *v.* Vanness, 5 Halstead's Rep. 102. And see Armstrong *v.* Jackson, 1 Blackf. 210; Brown *v.* Lutterloh, Cameron & Norwood's Rep. 425.

Evidence to identify the lands with those described in the declaration is inadmissible, Newman *v.* Lawless, 6 Missouri Rep. 283.

Although a plaintiff in ejectment may recover less than he claims, yet it must consist of the same nature with that claimed. If he claims an undivided moiety, an undivided third, &c., may be recovered, but he cannot recover an undivided part, where he claims an entirety, and *vice versa*. Carrol et al., Lessee *v.* Norwood's Heirs, 1 Harr. & Johns. Rep. 463. (*In nota.*)

The plaintiff cannot declare for a whole tract of land, and give evidence of a title to an undivided moiety. Young *v.* Drew, 1 Taylor, 119. Young *v.* Harris. Ib.

In ejectment the plaintiff shall recover according to his right: if the whole be demanded, the jury may find a moiety, and it is good. Doe ex dem. Chapin *v.* Scott, Chipman's Rep. 74.

In ejectment for a moiety of a tract, a third may be recovered. Squires *v.* Riggs, 2 Hayw. Rep. 150.

So, if the plaintiff sue for a ninth, he may recover an eighteenth. Den *v.* Evans, 2 Hayw. Rep. 222.

If the plaintiff in ejectment declare for the whole, he may recover a part; or, if he declare for a part, he may recover less: the rule is, that he may not recover more than he declares for. Lessee of Patten et al. *v.* Cooper, 1 Cooke's Rep. 333. M'Arther *v.* Porter, 6 Peters' Rep. 205.

law be said to demise them. As, where A. was tenant for life, and B. had the remainder in fee, and they made a lease to C., and declared upon the lease as a *joint demise,* it was held bad; because, during A.'s life, it was the lease of A., and the confirmation of B., and after the death of A., it was the lease of B., and the confirmation of A., but not a joint demise.(*a*)

Joint tenants, or co-parceners, have a sufficient interest in the lands held in joint tenancy, or parcenery, to entitle them to make a joint demise of the whole premises, but tenants in common have not:[1] and

(*a*) King *v.* Bery, Poph. 57; Treport's case, 6 Co. 75,(*b*).

Under a demise, in a declaration in ejectment, of an entire tract of land, less than the whole may be recovered, but it must be an entire and not an undivided interest. Benson's Lessee *v.* Musseter, 7 Harr. & Johns. Rep. 208.

If the plaintiff, in his declaration, claim the whole tract, a deed conveying any undivided interest is admissible in evidence. Doe, Lessee of Lewis et ux. *v.* M'Farland et al., 9 Cranch's Rep. 151.

The plaintiff in ejectment cannot recover a greater quantity, or interest, than he declares for, but he may recover less. Davis' Lessee *v.* Whiteside, 1 Bibb's Rep. 510.

A plaintiff, in ejectment, who declares for a sole interest, may recover an undivided moiety. Gist's Heirs *v.* Robinet, 3 Bibb's Rep. 2.

When the plaintiff is entitled to an undivided moiety, he cannot have a general verdict for the whole land; he can only enter as tenant in common, and have partition made if he desires to hold in severalty. Simmons & White *v.* Wood's Lessee, 6 Yerger's Rep. 518.

Thus, if the demise be laid from two heirs, and it appeared that there were three, yet the plaintiff shall recover an undivided interest of two-thirds. Ward's Heirs *v.* Harrison, &c., 3 Bibb's Rep. 304. Larue's Heirs *v.* Slack et al., 4 Bibb's Rep. 358.

If the lease in a declaration in ejectment, is stated to have been made on the 7th day of July, 1825, to hold from "the sixth day of July then last past," it shall be construed to mean the 6th day of July, 1825, and not the 6th day of July, 1824, which was prior to the accrual of the plaintiff's title; for, where the words may be rendered either way, that construction which renders the fictitious demise useful to the action, ought to be adopted, rather than that which would destroy it. Den ex dem. Burhams *v.* Vanness, 5 Halst. Rep. 102.

[1] Tenants in common may recover on a joint demise. Doe ex dem. Nixon's heirs *v.* Potts, 1 Hawk's Rep. 469. Doe *v.* Fleming, Ohio Con. Rep. 370.

Tenants in common may declare either on a joint demise, or on separate demises. Jackson ex dem. Vandenberg et al. *v.* Bradt, 2 Caines' Rep. 169.

Where the declaration in ejectment states that the lessor jointly and severally demised, it is supported by proving a tenancy in common. Courtney, &c. *v.* Shropshire, 3 Litt. Rep. 265.

There is nothing impracticable in fact, nor absurd in law, in joint and several demises of the same land. Ib.

In Vermont, tenants in common may maintain a joint action of ejectment. Hicks et al. *v.* Rodgers, 4 Cranch's Rep. 165. Harrison *v.* Botts. Ib. 313.

the reason for this difference seems to be, that tenants in common have several and distinct titles and estates, independent of each other, so as to render the freehold several also; whilst joint tenants and
[*210] parceners *are seised *per my et per tout*, derive by one and the same title, have a *joint* possession, and must join in any action for an injury thereto; so that each of them may properly be said to demise the whole.(*a*)

In case of a joint demise by two tenants in common, where *the Judge at *nisi prius* refused to amend the record by altering the demise, and the plaintiff was thereupon non-suited, the Court would not allow the propriety of the refusal to be discussed in bank.(*b*)

It is not, however, compulsory upon joint tenants, or parceners, to allege a joint demise;[1] for if a joint tenant, or parcener, bring an ejectment without joining his companion in the demise, it is considered as a severance of the tenancy, and he will be allowed to recover his separate moiety of the land. And if all the joint tenants, or parceners, join in

(*a*) Moore *v.* Fursden, 1 Show. 342; Millener *v.* Robinson, Moore, 682; Boner *v.* Juner, Ld. Raym. 726; Mantle *v.* Wollington, Cro. Jac. 166; Morris *v.* Barry, 1 Wils. 1; Heatherly d. Worthington *v.* Weston, 2 Wils. 232; Doe d. Blight *v.* Pett, 11 Ad. & Ell. 842; Doe d. Poole *v.* Errington, 1 Ad. & Ell. 750.

(*b*) Doe d. Poole *v.* Errington, 1 Ad. & Ell. 750.

A declaration in ejectment, by tenants in common *quod demisserunt*, is bad. Stinnetz et al. *v.* Nixon, 3 Yeates' Rep. 285.

If the declaration in ejectment, in the old form, by several plaintiffs, set forth a joint demise, and in making out their title, it appears they are tenants in common, they cannot recover. White et al. *v.* Lessee of Pickering et al., 12 Serg. & R. Rep. 435.

In ejectment, tenants in common cannot make a joint demise. Innis *v.* Crawford, 4 Bibb's Rep. 241. Gaines *v.* Buford, Dana's Rep. 501. Wathen *v.* English, 1 Missouri Rep. 746. Duke *v.* Smith. Ib. 313.

[1] One of the several co-parceners may bring ejectment on her separate demise. Jackson ex dem. Fitzroy et ux., et al. *v.* Sample, 1 Johns. Cas. 231. Chambers *v.* Handley's Heirs, 3 Marshall's Rep. 98, (new series.)

Separate demises, from several lessors, may be laid in the declaration in ejectment; and the plaintiff, at the trial, may give in evidence the separate titles of the several lessors to separate parts of the premises in question, and recover accordingly. Jackson ex dem. Roman et al. *v.* Sidney, 12 Johns. Rep. 185.

Joint tenants must join in ejectment, and one of three joint tenants cannot recover a third part of the premises of a stranger. Milne *v.* Cumming, 4 Yeates' Rep. 577.

A declaration in ejectment contained two counts, one on a demise by A. and the other on a demise by B. Held, that the plaintiff might recover on the count whereby the land was demised by B., although he could not recover on the other count. Bevans *v.* Taylor et al. Lessee, 7 Harr. & Johns. Rep. 1

the action, but declare upon separate demises by each, it is held that they may recover the whole premises ; because, by the several demises, the plaintiff has the entire interest in the whole subject matter, although the joint tenancy is severed by the separate letting.(*a*)

When two or more tenants in common are lessors of the plaintiff, a separate demise must be laid by each ;(*b*) or they must join in a lease to a third person, and state the demise to plaintiff to have been made by their lessee. The first is the most usual mode of proceeding, and the declaration need not state the several demises to be of the several shares belonging to the several tenants respectively : but *each demise may be alleged generally to be of the whole [*211] premises demanded ; for, under a demise of the whole, an undivided portion may be recovered.(*c*)[1]

The demise must be laid in the name of the party in whom the legal title is vested, and when any doubts exist upon the point, it is usual to declare upon several distinct demises by the several persons concerned in interest ;(*d*)[2] and the claimants will *not then be confined at the trial

(*a*) Doe d. Gill *v.* Pearson, 6 East, 173 ; Roe d. Raper *v.* Lonsdale, 12 East, 39 ; Doe d. Marsack *v.* Read, 12 East, 57 ; Doe d. Lulham *v.* Fenn, 3 Campb. 190.

(*b*) App. No. 14, 15.

(*c*) Doe d. Bryant *v.* Wippel, 1 Esp. 330.

(*d*) App. No. 14, 15.

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[1] See N. Y. Rev. Sts., pt. 3, ch. 5, Tit. 1, § 9.

[2] In the case of Jackson ex dem. Roman et al. *v.* Sydney, (12 Johns. Rep. 185,) the court said, "The declaration contains separate demises from each lessor, and upon the trial it was offered, on the part of the plaintiff, to show separate title in each lessor to a distinct part of the premises in question ; and this was objected to and overruled by the judge, and the plaintiff compelled to elect and proceed upon one count only. Had the lessors been tenants in common of the premises, there could be no doubt but that they could have had a right to recover the whole, if they could have shown a title to the same. And there can be no good reason against their showing a separate title in each to a distinct part. It cannot subject the defendant to any inconvenience, or operate as a surprise upon him ; and the costs to which he may be made liable, on a recovery against him, will be much less than if four separate actions were brought. It is a course, therefore, that ought to be encouraged, as it prevents multiplicity of suits. A new trial must, therefore, be awarded, with costs to abide the event of the suit." And see Magruder *v.* Peter, 4 Gill & Johns. 323.

The N. Y. Revised Statutes (part 3, ch. 5, tit. 1, secs. 10 and 11,) contain the following provisions :

Sec. 10. "If the action be brought for the recovery of dower, the declaration shall state that the plaintiff was possessed of the one undivided third part of the premises, as her reasonable dower as widow of her husband, naming him. In every other case, the plain-

to one particular demise, but will be allowed to resort to any included in the declaration, under which they may be able to prove a title to the premises. Difficulties of this nature frequently occur when trustees are lessors of the plaintiff; and it is always advisable to lay separate demises by the trustees, and *cestui que trust*, unless the effect of the Statute of Uses upon the trust is clear and indisputable. But application should, in strictness, be first made to such trustees for permission to make use of their names; and where demises are inserted in the names of any parties without their authority, the Court, on motion, will order such demises to be struck out of the declaration,(*a*) unless the justice of the case requires their insertion, and a sufficient indemnity is given; and they will also interfere to set aside proceedings after verdict under similar circumstances, if the application be *bona fide*, and the affidavit on which it is grounded distinctly and unequivocally show the want of such authority.(*b*) But where a bankrupt laid a demise [*212] by his assignees *without their permission, (they having given up to him the property in the premises,) and obtained judgment and execution thereupon, the Court refused to set the proceedings aside at *the instance of the defendant in the ejectment*, notwithstanding an affidavit from one of the assignees that he knew nothing of the premises in question; considering the application a mere contrivance for defeating the action.(*c*)

In a case in which the ejectment was brought on two several demises of A. and B., the Court granted an application to strike out B.'s

(*a*) Doe d. Shepherd *v.* Roe, 2 Chitty, 171.
(*b*) Doe d. Hammeck *v.* Fellis, 2 Chitty, 170.
(*c*) Doe d. Vine *v.* Figgins, 3 Taunt. 440.

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tiff shall state whether he claims in fee, or whether he claims for his own life, or the life of another, or for a term of years, specifying such lives or the duration of such term.

Sec. 11. "In any case other than where the action shall be brought for the recovery of dower, the declaration may contain several counts, and several parties may be named as plaintiffs, jointly, in one count, and separately, in others."

A declaration, stating that the lessors jointly and severally demised, is supported by proving a tenancy in common. Courtney *v.* Shropshire, 3 Lit. 265.

A declaration may contain several counts in the names of several persons as plaintiffs, in the manner heretofore used, when the suit was brought in the name of a nominal plaintiff, and separate demises were laid in the names of separate lessors; it is not necessary that it should contain a joint count, or that a joint interest or joint injury should be alleged. Smith *v.* Dewey, 15 Wen. 601.

See Kelsey *v.* Hamner, 18 Conn. Rep. 311; Atkenson *v.* Rittenhouse, 5 Barr. 103; Pitts *v.* Bullard, 3 Kelly, 5; Greer *v.* Smith, 7 Yerger, 487.

name, on affidavit that the tenant claimed under B., that the action was defended to protect B.'s interest against A., and that A. claimed under a conveyance from B., which was asserted to be invalid by reason of fraud; and this, although it was sworn, in opposition, that the conveyance from B. to A. was *bona fide* for good consideration, and that A. was in *circumstances enabling him to defray the expenses of the proceedings, and to indemnify B. The principle of this decision seems to be, though no reasons are assigned by the Court, that the demise by A. would be sufficient, unless the conveyance to him was a fraudulent one.(*a*)

If, also, there is a dispute as to the inheritance, the Court will not compel the trustee of an outstanding term attending such inheritance to lend his name to either party.(*b*)

When there are several demises, and proof is given in respect of all of them at the trial, if evidence be tendered by the defendant, which affects some of them only, the claimant may abandon such demises, and rest his case upon the demises which such evidence does not affect.(*c*)

If a corporation be aggregate of many, they may set forth the demise without mentioning the Christian names of the corporators; but if the corporation be sole, as if the demise be by a bishop, the name of baptism must be inserted. The reason of this is, that in the first case the name solely consists of its character, but in the last in its person; therefore, there cannot be a sufficient specification of that person without mentioning his name.(*d*)

In a case where the demise was laid to be by the "Mayor, &c., of the borough town of Maldon," and the name of the corporation, as appeared from the charter, was the "Mayor, &c., of Maldon," it was held to be no variance, it appearing from the charter, which was in evidence, that Maldon was a borough town.(*e*)

(*a*) Doe d. Hurst *v.* Clifton, 4 Ad. & El. 809.

(*b*) Doe d. Prosser *v.* King, 2 Dow. P. C. 580.

(*c*) Doe d. Rowlandson *v.* Wainright, 2 Ad. & Ell. 520; S. P. Doe d. Hogg *v.* Tindal, 1 M. & M. 314.

(*d*) Carter *v.* Cromwell, Sav. 128, cited Dyer, 86.

(*e*) Doe d. Mayor, &c., of Maldon *v.* Miller, 1 B. & A. 699.

*The stat. 59 Geo. III. c. 12, s. 17, which vests all lands, &c., belonging to the parish, in the churchwardens and overseers for the time being in the nature of a body corporate, requires that the parties shall in all actions be named and described as overseers; but where, in an ejectment brought under that statute, the declaration contained two counts, one describing the lessors by their office without their names, and the others by their names without their office, it was held sufficient after verdict;(a) and, in another case, where one set of counts specified the names of the individuals, and the other set omitted them, the Court, on motion, directed the last set to be struck out.(b)

It was formerly holden, that in an ejectment by a corporation aggregate, a power of attorney was necessary, authorising some person to enter and make a lease on the lands; that such person accordingly should enter, and make a lease under seal; and that the declaration should state the demise to be by deed.(c) These forms, [*216] *it seems, were deemed necessary, upon the principle that a corporation aggregate cannot perform any corporate act otherwise than under the corporation seal, nor make an attorney, or bailiff, but by deed. But, since the principles of this action have been more clearly understood, none of these peculiarities are necessary; and the demise may now be laid in the general way, without any power of attorney being made, any lease being signed,(d) or any statement of such a lease being introduced into the declaration. One case only is, indeed, to be found upon the latter point, and in that the question arose after verdict;(e) but, from the reasoning then used by the Court, no doubt can be entertained that the principle would be extended to every stage of the action; and that a plaintiff in ejectment would never be non-suited for the omission of such a statement.(g) The demise †is still certainly sometimes stated to be by deed; and it is immaterial whether it be so or not, as, notwithstanding the statement, no proof of the deed is required(h)

(a) Doe d. Orleton *v.* Harper, 2 D. & R. 708.
(b) Doe d. Llandesilio *v.* Roe, 4 Dow. P. C. 222.
(c) Gilb. Eject. 35.
(d) Furley d. Mayor of Canterbury *v.* Wood, 1 Esp. 198.
(e) Patridge *v.* Ball, Ld. Raym. 136; S. C., Carth. 390.
(g) In the case of Doe d. Dean and Chapter of Rochester *v.* Pierce, the demise was in the common form, and many objections were taken upon other points by the defendant's counsel, and overruled; but they never adverted to the circumstance of the demise not being stated to be by deed. Kent, (Sum. Ass. 1809, MS.)
(h) Furley d. Mayor of Canterbury *v.* Wood, 1 Esp. 198.

So, likewise, in an ejectment for tithes, it is now unnecessary to declare on a demise by deed, although tithes cannot pass unless by deed ;(*a*) and following out the principle, it is not necessary, when the demise is by the master and fellows of a college, dean and chapter of a cathedral, *master or guardian of an hospital, [*218] parson, vicar, or other ecclesiastical person, to state rent to have been reserved, &c., pursuant to the statute 13 Eliz.. c. 10 ;(*b*) nor need such statement be made when the demise is by an infant,(*c*) though it formerly was held otherwise.

The day of the demise must be subsequent to the time when the claimant's right of entry accrues, and previous to the time of the service of the declaration.(*d*)[1] It is usual, however, to lay the demise

(*a*) Swadling *v.* Piers, Cro. Jac. 613 ; Partridge *v.* Ball, Ld. Raym. 136; S. C., Carth. 390.
(*b*) Carter *v.* Cromwell, Sav. 129.
(*c*) Zouch *v.* Parsons, Burr. 1794, 1806, Lill. Prac. Reg. 673.
(*d*) Ante, 10 ; Goodtitle d. Galloway *v.* Herbert, 4 T. R. 680 ; Doe d. Lawrence *v.* Shawcross, 3 B. & C. 752.

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[1] *Vide* N. Y. Revised Statutes, part 3, ch. 5, tit. 1, sec. 7.

The demise laid in a declaration in ejectment must be laid as of a day subsequent to that when the lessor's right of entry accrued. Dickenson *v.* Jackson ex dem. Caldwell, 6 Cow. Rep. 147 ; Coxe *v.* Joiner, 3 Bibb. 297.

In ejectment by the mortgagee against the mortgagor, or those claiming under him, the demise must be laid as of a day subsequent to a default in payment ; and subsequent to a dissolution of the tenancy, by notice to quit or otherwise. Ib.

The time of the demise must be laid at, or subsequent to, the period when the lessor's right accrued. Van Allen *v.* Rogers, 1 Johns. Cas. 283 ; Obert *v.* Bordine, 1 Spencer, 394.

A demise, being laid in ejectment before the title of the lessor of the plaintiff accrued, cannot be taken advantage of after issue joined. Whittington et al. *v.* Christian et al., 2 Rand. Rep. 353.

If, in ejectment, the demise and ouster be laid precedent to the plaintiff's title, it is cured by the act of jeofails. Duvall et al. *v.* Bibb, 3 Call's Rep. 362 ; Winn *v.* Cole's heirs, Walker's Rep. 119.

A copy of a declaration in ejectment having been delivered to the sheriff to be served, it was discovered that the lessor had died before the date of the lease. Before the return day, another declaration, stating the lease, before the lessor's death, was delivered and filed. A motion to quash the proceedings was refused. Lessee of Ferguson *v.* Smallman, Addis. Rep. 13.

In an action of ejectment, the demise in the declaration was stated to be on the first of January, 1801, and the conveyance offered in evidence, under which the plaintiff claimed, was dated on the 23d February, 1802 ; held, that an ejectment is an action to try the right of possession to the land in controversy. The lease, entry, and ouster laid in the declaration are fictitious, and substituted in the place of a real lease, actual entry, and ouster. The

as far back as the lessor's title will admit; because the judgment in ejectment is conclusive evidence as to the title of the lessor, for all the mesne profits accruing subsequently to the day of the demise;(*a*) and when there are any doubts as to the period when the lessor's title accrued, it is customary to state different demises by him on different days.

In an ejectment on the demise of an heir by descent, the demise was laid on the day the ancestor died, and held to be well enough; for the ancestor might die at five o'clock, the heir enter at six, and make a lease at seven, which would be a *good lease.(*b*) It seems also, according to Lord Hardwicke, that a posthumous son, taking lands under the provisions of 10 & 11 Wm. III. c. 16, would be entitled to lay the demise from the day of his father's death.(*c*)

It has already been observed, that, in an ejectment by the surrenderee of copyhold premises, the demise may be laid against all persons, but the lord, on a day between the times of surrender and admittance, provided the surrenderee be admitted before trial.(*d*)

If the date of the year of the demise be omitted in the declaration, the defendant cannot take advantage of it at *nisi prius;* and it seems the proper course for him to pursue would be to apply to the Court to compel the lessor to insert the correct date.(*e*)

When an ejectment is founded on stat. 4 Geo. II. c. 28, s. 2, the day

(*a*) Aislin *v.* Parkin, Burr. 656.
(*b*) Roe d. Wrangham *v.* Hersey, 3 Wils. 274.
(*c*) B. N. P. 105.
(*d*) Ante, 47; Doe d. Bennington *v.* Hall, 16 East, 208.
(*e*) Doe d. Parsons *v.* Heather, 8 M. & W. 158.

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time of the demise is matter of substance, and not form, and the plaintiff must show a title in his lessors, anterior to the time of the demise; because, without such title they could not make a real lease. Wood *v.* Grundy et al. Lessee, 3 Harr. & Johns. Rep. 13.

The averment of title in a declaration must be of a day subsequent to the accruing of the title of the plaintiff, and the ouster complained of must be stated as having happened on some subsequent day. Siglar *v.* Van Riper, 10 Wen. 414; Den *v.* M'Shane, 1 Green's Rep. 35.

It is not essential, however, to show the accruing of the title precisely as laid; it is enough if it be shown to exist before the day laid in the declaration; and, in ordinary cases, it is not necessary to give any proof whatever of the ouster. Ib.

of the demise must be subsequently to the last day on which the rent is payable, to save the forfeiture.(*a*)

Tenancies at will scarcely exist at the present day; but, when an ejectment is brought against a tenant at will, the demise must be laid subsequently to the time when possession is demanded, that is to say, subsequently to the determination of the will.(*b*)

The length of the demise has no reference to the nature of the title of the claimant, and may be of longer duration than his interest in the land.(*c*) A contrary doctrine was once indeed maintained, upon the principle, that by a judgment in *ejectment the plaintiff recovers his *term* mentioned in the declaration, and, therefore, if the term declared on be of greater duration than the lessor's title, as, for instance, if the lessor be entitled to the lands for three years only, and the plaintiff declare on a demise for five, he would wrongfully hold the lands for the last two years.(*d*) But this doctrine has since been justly overruled; because if the lessor have the right of possession but for a month, and make a lease for seven years, it will enure to his lessee for the month duly, and during that time he will be entitled to the possession; and, as the judgment in ejectment could not be used by the lessor as evidence of his title, he could not, by reason of it, keep possession after the month has expired.(*e*)

Seven years is the term usually declared upon; and the only direction necessary to be given upon this point is, that the term be of a length sufficient to admit of the lessor's recovering possession of the land before its expiration; although the Courts are now very liberal in permitting lessors to amend in this respect, as will be stated hereafter.(*g*)

It is not necessary to give any local description of the premises in the declaration beyond a statement of the county in which they lay.[1]

(*a*) Doe d. Lawrence *v.* Shawcross, 3 B. & C. 752; ante, 122.
(*b*) Ante, 75.
(*c*) Doe d. Shore *v.* Porter, 3 T. R. 13.
(*d*) Roe *v.* Williamson, 2 Lev. 140; S. C., 3 Keb. 490.
(*e*) B. N. P. 106; Clarke *v.* Rowell, 1 Mod. 10; *vide* Doe d. Strode *v.* Seaton, 2 C., M. & R. 728.
(*g*) *Post*, page 779.

[1] *Vide* N. Y. Revised Statutes, part 3, chap. 5, tit. 1, sec. 8, vol. 2, p. 304, n. (1).
A writ of ejectment which mentions the township and county, the number of acres, and

A demise of premises "situate in the county aforesaid," without any other local description, has been held sufficient on a motion in arrest of judgment;(*a*) but it seems that the omission of *all* local description will be error, although the county and vill *in which the demise was made* are stated in the declaration, and the county is stated in the margin.(*b*) But where the declaration stated, that one M. S., "*at Haswell, in the county of B.*," demised to plaintiff two *messuages, from which messuages defendant, *at Haswell aforesaid*, ousted plaintiff; the Court considered, that the statement of the ouster, being *at Haswell*, amounted to a sufficient certainty that the lands demised lay *at Haswell*.(*c*)

[*219] When, however, the premises are described *as lying in a parish, hamlet, &c., the description must be a correct one; and an uncertain or improper description will be fatal. Thus, "in the parishes of A. and B., or one of them," has been held too uncertain,(*d*) though if the words "or one of them" had been omitted, the description would have been sufficient, though all the lands were contained in one of the parishes.(*e*)

(*a*) Doe d. Edwards *v.* Gunning, and Doe d. Bassett *v.* Mew, 7 Ad. & Ell. 240.

(*b*) Doe d. Rogers *v.* Bath, 2 Nev. & M. 440.

(*c*) Goodright d. Smallwood *v.* Strother, Black. 706.

(*d*) Goodright *v.* Fawson, 7 Mod. 457; S. C., Barn. 184; Cottingham *v.* King, Burr. 624, and the authorities there cited.

(*e*) Goodwin *v.* Blackman, 3 Lev. 334. In this case, the ejectment was, "for a tenth part of a messuage in D. and F." And the whole messuage appearing in evidence to lay in D., and no part in F., the description was held ill, because it was "precisely of the tenth part of an entire thing;" though it was said by the Court, that, if the ejectment had been of an acre

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the names of the owners of adjoining lands, is sufficient description of the land within the act of the 21st of March, 1806, (4 Sm. Laws, 332, Pennsylvania.) Hawn *v.* Norris et al., 4 Binn. Rep. 77.

A description, naming the county and township, the quantity of acres, and the adjoining lands by which the tract is bounded, is sufficient. Lyons *v.* Miller, 4 Serg. & R. Rep. 279.

Where a statement described lands as "a certain piece or parcel of land, situate below and adjoining A. township, B. county, containing forty acres, be the same more or less, being part of a tract of land conveyed in the name of C. D., and bounded by land surveyed in the name of E. F.," this was held to be a sufficient description. Thomas *v.* Culp, 4 Serg. & R. Rep. 271.

In ejectment, a description of the land claimed as two houses, one barn, eighty acres of arable land, twenty of woodland, with the appurtenances, in Penn township, Northumberland county, being part of a tract of land surveyed in pursuance of a warrant granted to W. G., is sufficient after verdict. Fisher et al. *v.* Larick et al., 7 Serg. & R. Rep. 99.

See Talbot *v.* Wheeler, 4 Day, 448.

Where the premises were described as situate "*in the united parishes of A. and B.*," which parishes had been united together by act of Parliament, for the maintaining of their poor, but for no other purpose, the variance was held fatal; for the parishes remained entirely distinct, except as to the maintenance of the poor.(*a*)

Where the premises were described as situate in the parish of A. and B., and it appeared that A. and B. were separate parishes, the Court of Common Pleas rejected the word parish as surplusage, and considered the demise as of lands in A. and B.;(*b*) but, in a case tried before Mr. Baron Parke, in which the description was precisely similar, the variance was held fatal. "Had the allegation," says the learned Baron, "been that the houses were in the *parishes* of A. and B., I should have thought the argument good in favor of the divisibility of such allegation, but here the plaintiff has mentioned only one parish, and that by a name which does not belong to any parish."(*c*)

*Where the premises were laid to be in the parish of Farn- [*220]
ham, and were proved at the trial to be in the parish of Farnham Royal, it was held not to be a fatal variance, unless it could be proved that there were two Farnhams.(*d*) [1] Where, also, the premises were described as being in the parish of W., and it was proved that there were two parishes of W., viz.: W. on Trym, and W. on

of land in D. and F., and it appeared that the whole acre was in D., it would be well enough. The reason for this diversity seems to be, that *the acre* being the whole thing demanded, the description is sufficiently certain, although it all be in one parish; whereas, when only *a tenth part* is demanded, it is uncertain which tenth part is meant, and, therefore, as no tenth part answers the description, the sheriff could not give execution: *tamen quære, et vide* Burr. 330, and Doe d. Marriott *v.* Edwards, 1 M. & R. 319.

(*a*) Goodtitle *v.* Pinsent d. Lammiman, 2 Camp, 274; S. C., 6 Esp. 128.

(*b*) Goodtitle d. Brembridge *v.* Walter, 4 Taunt. 671.

(*c*) Doe d. Marriott *v.* Edwards, 1 M. & R. 319.

(*d*) Doe d. Tollet *v.* Salter, 13 East, 9.

[1] A tract includes land in two counties, the recovery in one county cannot extend to the other: there must be a separate entry and separate action in each county. Sowder *v.* M'Millan's heirs, 4 Dana's Rep. 458.

As to what description of the land is sufficient, see Russell *v.* Fee, 1 Browne, 194; Griffith *v.* Dobson, 3 Penn. 228; Hawn *v.* Norris, 4 Binn. 77; Fisher *v.* Larick, 7 Serg. & R. Rep. 99; Den *v.* Woodson, 1 Haywd. 24; Chamberlain *v.* Crawford, 1 Har. & M'Hen. 355; Redding *v.* M'Cubbin, 1 Har. & M'Hen. 368; Barclay *v.* Howell, 6 Pet. 498; Fenwick *v.* Floyd, 1 Har. & Gill 172; Fouke *v.* Kemp, 5 Har. & John. 135; Talbot *v.* Wheeler, 4 Day, 448; Wooster *v.* Butler, 13 Conn. Rep. 309; Job *v.* Tebbetts, 4 Gilman, 159.

Severn, the description was holden to be sufficiently certain, because "in common language the addition is not used."(*a*)

When the premises lie in different parishes, it has been usual to enumerate the whole as lying in one parish, and to repeat the description of them as lying in the other parish; but it seems sufficient to enumerate them once only, describing them as lying in the [*221] parishes of A. and B., or in A. and B. *respectively.(*b*)

The number of messuages, acres, &c., mentioned in the demise, need not correspond with the number to which the lessor claims title. He may declare for an indefinite number, as a hundred messuages, a thousand acres of arable land, &c.; and care should be taken that the number specified in the *demise be larger than the number claimed;[1] because, although if he declare for more than he is entitled to, he may recover less, the reverse will not hold.(*c*) [2] Upon the same principle, if the lessor of the plaintiff be entitled to a moiety, or other part, of an entire thing, as the half, or third part, of a house, he may recover such moiety, or third part, on a demand for the whole.(*d*)

OF THE ENTRY.

The entry of the plaintiff on the land need not be alleged in the declaration, to be made on any particular day, although in the precedents

(*a*) Doe d. James *v.* Harris, 5 M. & S. 326.

(*b*) 2 Chitty, Prec. 395.

(*c*) Denn d. Purvis *v.* Purvis, Burr. 326; Guy *v.* Rand, Cro. Eliz. 13.

(*d*) Ablett *v.* Skinner, 1 Siderf. 229; Goodwin *v.* Blackman, 3 Lev. 334. In an ancient case it is said, that if an ejectment be brought for an acre of land, and the metes and bounds be described in the declaration, and the jury find the defendant guilty in half an acre of land, the verdict will be bad; because of the uncertainty of which part, or moiety, the plaintiff is to have execution. (Winkworth *v.* Mann, Yelv. 114, *tamen quære, et vide ante* chap. 2.)

[1] The lessor of the plaintiff may declare for an indefinite number of tracts of land, and recover according to the quantity to which he proves title. Huggins *v.* Ketchum, 4 Dev. & Batt Rep. 414.

[2] A plaintiff in ejectment, claiming under a deed conveying "the balance of a tract of land," must show what the balance is, and where situate, or he cannot recover. Taylor et al. *v.* Taylor et al., 3 Marsh. Rep. (Ky.) 19.

If the plaintiff in ejectment declare for the whole, he may recover a part; or, if he declare for a part, he may recover less: the rule is, that he may recover less, though he cannot recover more than he declares for. Lessee of Patton et al. *v.* Cooper, 1 Cooke's Rep. 133.

The plaintiff may recover, though the defendant be in possession of less than is declared for. White *v.* Saint Guirons, 1 Minor's Rep. (Alabama,) 331.

See Mitchell *v.* Glover, 1 Harr. & Johns. 507. Mower *v.* Mower, 20 Wend. 635.

it is usually so stated. It is sufficient if it be declared generally, that the plaintiff entered by virtue of the demise: nor does it seem to have been required, even in the ancient practice, to be more explicit, because, as the plaintiff entered by virtue of the lease, he must necessarily *have entered after his title accrued; though it was then [*222] said, that it might have been otherwise, if the declaration had been *prætextu cujus* he entered, for the plaintiff might enter unlawfully, or before his time, under pretence of the lease.(*a*)

OF THE OUSTER.

The day upon which the ouster of the plaintiff, by the casual ejector, is alleged to have taken place, should regularly be after the commencement of the supposed lease and entry.[1] This is requisite, in order to support the consistency of the fiction; *because, as the title of the plaintiff is supposed to arise from the lease mentioned in the declaration, it would be absurd for him to complain of an injury to his possession before, by his own showing, he had any claim to be possessed. But it does not seem absolutely necessary that this consistency should be preserved; for, as the words "afterwards, to wit," are always used immediately before mentioning the day of the ouster, it is most probable, upon the principles by which ejectments are at present regulated, that the Courts would in all cases consider an ouster laid previously to the day of the entry, "as impossible and repugnant," and as such reject it.(*b*) Even when the old practice prevailed, and the true principles of the remedy were so little understood, every possible intention was made in favor of the plaintiff, when an ouster was alleged anterior to the time of the demise. Thus, on a demise from the first of February, 1752, to hold from the eighth of January before, and that afterwards, namely, *on the 28th of January, 1752, defendant [*223] ejected him, and it was insisted, for the defendants, that the plaintiff's title did not commence until the first of February, and there-

(*a*) Wakely *v.* Warren, 2 Roll. Rep. 466; *sed vide* Douglas *v.* Shank, Cro. Eliz. 766.
(*b*) Adams *v.* Goose, Cro. Jac. 96; B. N. P. 106.

[1] Where a declaration in ejectment stated a lease, on a certain day, to hold from the same day, and that the defendant on the same day, afterwards ejected the lessee, it was ruled that the latter words might be considered as surplusage. Lessee of Lynn et al. *v.* Downes, 1 Yeates' Rep. 518.

It is not necessary to state the particular date of the ouster. Miller *v.* Shackleford, 4 Dana, 264.

fore that the ouster was laid too soon; the Court held, that the day of the ouster, being laid under a *scilicet*, was surplusage, and that "afterwards" should relate to the time of making the lease, and then all would be well enough.(*a*) In like manner, on a demise from the sixth of May, *anno septimo*, by virtue of which plaintiff entered, and was possessed until afterwards, on the eighteenth of the same month, *anno sexto supradicto*, defendant ejected him, the Court held the declaration sufficient; because the ouster was laid to be on the eighteenth of the same month, which it could not be if it were done in the sixth year, and rejected the word *sexto* as inconsistent and void.(*b*) Upon the same principle, where the demise was on the sixth of September, (2 Jac.,) by virtue of which the plaintiff held, until afterwards, (to wit) on *the fourth day of September, (2 Jac.,) defendant ejected him, the declaration was holden good, and the words under the *scilicet* rejected as surplusage.(*c*)

[*224] *From the case of *Merril* v. *Smith*,(*d*) it does not seem necessary to allege any particular day for the ouster, provided it appears from the declaration, to be subsequently to the commencement of the term, and prior to the bringing of the action; but in the precedents a day certain is always laid, and it is the better method to mention a particular day.

With respect to the ouster in an ejectment for tithes, it is said in the case of *Worrall* v. *Harper*,(*e*) that where the ouster was set forth to have been made in the month of May, it was held ill, because there were no tithes to be ousted of at that season of the year; but this doctrine is controverted by Gilbert, C. B., on the principle that the law does not judicially take notice of the time when tithes arise.(*g*)

(*a*) B. N. P. 106.

(*b*) Davis *v.* Purdy, Yel. 182.

(*c*) Adams *v.* Goose, Cro. 96. Some old ejectment cases are to be found in the books, (Goodgain *v.* Wakefield, 1 Sid. 7; Evans *v.* Croker, 3 Mod. 198; Stephens *v.* Croker, Comb. 83; Higham *v.* Cooke, 4 Leon. 144; Osborn *v.* Rider, Cro. Jac. 135; Llewelyn *v.* Williams, Cro. Jac. 258; Clayton's case, 5 Co. 1,) in which the ousters were laid on the same days as the demises, and which were decided upon the distinctions formerly taken, as to the time of the commencement of a demise, when stated in the lease to be "from the date," and when from "the day of the date," of the lease; but, since the judgment in Pugh *v.* Duke of Leeds, (Cowp. 714,) by which it has been determined, that these expressions shall be construed indifferently, either *inclusively or exclusively*, so as to give effect to the deed, these cases can no longer be authorities.

(*d*) Cro. Jac. 311; Jenk. 341.

(*e*) 1 Roll. Rep. 65.

(*g*) Gilb. Eject. 67.

OF AMENDING THE DECLARATION.[1]

It was formerly the practice not to permit the declaration in ejectment to be amended, until the landlord, or tenant had been made de-

[1] A plaintiff in ejectment, ought not to be permitted to amend his declaration by the addition of a count, stating a demise after the commencement of the suit. Cox *v.* Lacy, 3 Litt. 334; Dudley *v.* Grayson, 6 Monroe's Rep. 200.

But if such amendment were not opposed by the defendant, and it do not appear that he has sustained any injury in consequence of it, the judgment will not be reversed in the courts of appeal Ib.

Omissions in the declarations in ejectment against the casual ejector, may be cured in the declaration against the real defendant. Heidekopper *v.* Burrows, Cir. Ct. (April, 1805,) M.S. Rep. Cited in Wharton's Digest, p. 183.

A declaration in ejectment may be amended as in other actions. Den ex dem. Denny *v.* Smith, 2 Penn. Rep. 710.

A motion to file a new declaration in ejectment, the original being out of the office, and the defendant served with a notice to produce a copy, was refused. Den ex dem. Cleveland Crime, 1 Murphy's Rep. 268.

In ejectment it is generally allowed, of course, to amend by inserting a new demise where the proposed lessor has a subsisting title. Jackson ex dem. Harris et al. *v.* Murray et al., 1 Cow. Rep. 156.

Otherwise where the statute of limitations has attached. Ib.

And where the action was for a military lot, the defendants being *bona fide* possessors, and the effect would have been to defeat the operation of the statute, passed April 5th, 1803, (sess. 26, ch. 88, 3 Webster, 399,) and afterwards in 1813, (sess. 36, ch. 80, s. 4, 1 R. L. 304,) for their protection, the amendment was refused. Ib.

For such an amendment would be equivalent to a new action, with a rule that it should overreach the statute. Ib.

The court will allow the plaintiff in ejectment to amend his declaration, by changing the time of the demise, at any time before verdict, on such terms as will impose no hardships on the defendant. Wood *v.* Grundy et al., Lessees, 3 Harr. & Johns. Rep. 13.

In ejectment the court will permit the plaintiff before trial to amend his declaration, so as to make the demise subsequent to the date of his title. Rogers *v.* Barnett, 4 Bibb's Rep. 480.

A plaintiff in ejectment has no right to amend his declaration by adding a count containing a demise from another person, and for a tract of land not before claimed. Thomas *v.* Head, 1 Marsh. Rep. (Ky.) 450.

Where the declaration in ejectment, laid the demise on the first day of February, 1801, and possession under it "afterwards, to wit, on the first of January last, aforesaid;" it was held that these last words might be rejected, so that the possession would appear to be after the demise. Brown *v.* Lutterloh, Cam. & Norw. Rep. 425.

Amendment of the declaration by enlarging the demise in ejectment was granted. Den ex. dem. Young *v.* Erwin, 1 Hayw. Rep 323.

And the plaintiff shall not be non-suited, although the demise has expired at the time of trial. Den ex dem. Faircloth *v.* Ingraham et al., 1 Hayw. Rep. 501.

In ejectment, a declaration may be amended after issue joined, by introducing a new claim, but such introduction has no relation back to the service of notice; but the suit, as to

fendant, and consequently, if the defects were such as to prevent the Courts from granting the common rule *for judgment against the cas-

the new claim, originates with filing the amendment. Taylor et al. *v.* Taylor et al., 3 Marsh. Rep. (Ky.) 19.

A plaintiff in ejectment cannot be permitted to amend his declaration by adding a count, laying a demise after the commencement of the suit, but if such amendment were not opposed by the defendant, and it do not appear that he has sustained any injury in consequence of it, the judgment will not be reversed in the court of appeals. Cox *v.* Lacy, 3 Litt. Rep. 334.

It is doubtful whether a court, under any circumstances, would be justifiable in permitting, by way of amendment, a new count to be added to a declaration in ejectment, laying a demise from a different person. Rennick *v.* Calwell, 3 Litt. Rep. 237.

Several demises added, in ejectment, on payment of costs, it appearing that the lessors sought to be added, had a subsisting legal title. Jackson ex dem. Palmer et al. *v.* Travis, 3 Cow. Rep. 356.

Leave to amend a declaration in ejectment by adding a new demise, will not be given on a mere notice of motion, without any cause shown by affidavit. Jackson ex dem. Abby *v.* Smith, 5 Cow Rep. 39.

Contra. Anonymous case, 2 Caines' Rep.; Wimple et al. *v.* M'Dougal, Cole. Cas. 49, 55; Jackson ex dem. Quackenboss *v.* Dennis, 2 Caines' Rep. 177.

A new demise may be added, on terms, viz.: that the defendant have twenty days after service of amended declaration, to elect whether he would continue to defend; should he elect to defend, then he is to have the costs usual in cases of amendment, and twenty days from the time of making such election, to plead *de novo*, or abide by his former plea. If he elect to proceed no further, then to receive all his costs, up to the day of making such election. Anon., 2 Caines' Rep. 265. Same point. Anon., 2 Caines' Rep. 261; *et vide* Wimple et al. *v.* M' Dougal, Cole. Cas. 49.

After six years' service of the declaration in ejectment, leave was granted to amend, by adding new demises, on the plaintiff's paying all the costs already incurred, in case the defendant should choose to relinquish his defence. Jackson ex dem. Finch *v.* Kough, 1 Caines' Rep. 251.

The plaintiff will not be permitted to amend his declaration, by inserting a demise from a person who has no claim, or any subsisting title to the premises in question. Jackson ex dem. Starr *v.* Richmond, 4 Johns. Rep. 483.

The defendant may, at any time, move to have the demise of a lessor, who died before the commencement of the action, struck out of the declaration, without costs. Jackson ex dem. Low *v.* Reynolds, 1 Caines' Rep. 20; Jackson ex dem. Butler *v.* Ditz, 1 Johns. Cas. 392; S. C., Cole. Cas. 102; Jackson ex dem. Aikens et al. *v.* Bancroft, 3 Johns. Rep. 259.

Where, on application of the defendant in ejectment, a demise is ordered to be struck out of the declaration, he must serve a copy of the rule for the amendment on the plaintiff, which shall be deemed an actual amendment as to all subsequent proceedings on the part of the plaintiff; and the defendant, without a new copy of the declaration being served on him, must enter into the consent rule, and plead in twenty days after the service of the certified copy of the rule for the amendment, unless otherwise ordered by the court; and the rule shall be sufficient to authorize an actual amendment of the declaration on file, or to file a new one in its stead, whenever it may become necessary. Jackson ex dem. Kelly et al. *v.* Belknap, 7 Johns. Rep. 300.

A lessor may be struck out of the declaration, on affidavit of his having no interest in the premises. Jackson ex dem. Livingston et al. *v.* Sclover, 10 Johns. Rep. 368.

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ual ejector, the plaintiff's lessor was compelled to discontinue the action, and resort to a new ejectment.(*a*) But this practice is inconsistent with the present mode of regulating the remedy; and the Court would, it is presumed, *now permit the lessor to amend [*225] his declaration before appearance, provided such amendment did no injustice to the tenant. Indeed, where, by mistake, the name of the tenant in possession was inserted at the commencement of the declaration, instead of that of the casual ejector, (the declaration and notice to appear being in other respects regular,) the Court granted the rule for judgment upon the common affidavit of service, and suggested that if the tenant did not appear to the action, an application should be made to amend the declaration;(*b*) but where the mistake was in the Christian name of the lessor, the Court would not allow the amendment to be made where there was no appearance.(*c*)[1]

It is also said, that even after appearance, the declaration can be amended in *form* only, and not in *matter of substance*, but it is now difficult to point out what errors would be deemed substance, and not amendable. Under the strict rules, by which the action was formerly conducted, the demise, the length of the term, the time of the ouster,

(*a*) Roe d. Stephenson *v.* Doe, Barn. 186.

(*b*) Doe d. Cobbey *v.* Roe, K. B. T. T. 1816, MS.; Doe d. Dickenson *v.* Roe, 9 Dow. P. C. 363.

(*c*) Doe d. Street *v.* Roe, 8 Dow. P. C. 444.

The general rule is, that a lessor in ejectment ought to have a subsisting title or interest in the premises; but, under special circumstances, the court will permit his demise to be retained. Ib.

A declaration in ejectment may be amended by altering the date of the demise. Anon., 3 Halstead's Rep. 366.

Where there was no period stated in the declaration for the commencement of the term, and no date to the demise, the declaration was held bad, although after verdict for the plaintiff. The court said: "There is no title whatever stated in the plaintiff's declaration, no ground whereon the court can presume an entry after the lease, and no ouster after the entry, or an unexpired term at the commencement of the lease. Therefore, the judgment is arrested. Nokes ex dem. Hogg *v.* Shaw, Cam. & Norw. 457, 463.

[1] In ejectment, where the rights of the defendant are not affected by the proceedings, or he consents, the name of a lessor may be stricken out on a motion in behalf of such lessor, at any stage of the proceedings, though he originally consented to its insertion; but it must be on payment of his share of the costs to the plaintiff's attorney. Jackson ex dem. Sutherland et al. v. Stiles, 5 Cow. Rep. 418.

Amendment as to the place laid in the declaration in ejectment granted, upon payment of costs, after the plaintiff had been non-suited at the trial for the variance. Jackson ex dem. Sinclair et al. *v.* Bailey, 5 Cow. Rep. 265.

&c.,(*a*) were all considered as matters of substance;(*b*) and so unbending were the Courts upon these points, that if the term expired pending the action, by injunction from the Court of Chancery at the defendant's application, or by the delay of the Court, in which [*226] the action *was brought, in giving judgment, the lessor was obliged to resort to a new ejectment.(*c*)

A more liberal principle now prevails, and the demise, term, &c., are considered as formal only, and may be amended until the cause is called on for trial, and the jury sworn: the Judges acting uniformly on this sensible rule, that if the defendant has relied solely upon the formal defence, and will surrender up possession upon the amendment being made, he shall be paid the whole of his costs, but if he refuses to relinquish the possession and will hazard a trial notwithstanding the amendment, he is entitled to the costs of the amendment only.(*d*)

Thus with respect to the demise, in an ejectment to recover lands forfeited by the levying of a fine, where the demise was laid anterior to the entry, and the suit was staid by injunction, for more than five years after the fine was levied, so that the lessor was not in time to make a second entry, or bring a second ejectment, the Court permitted the day of the demise, to be altered to a day subsequent to the day of the entry.(*e*)[1] So likewise in an ejectment upon a forfeiture, where

(*a*) Formerly when a person declared in ejectment in the Common Pleas, it was the course of the Court, that after imparlance he should make a second declaration; and when this practice prevailed, if the plaintiff, by his first declaration, had laid the ouster before the commencement of his term, or omitted any other matter of substance, though the second declaration were correct, he could not recover; because the declaration on the imparlance roll was the material one on which the action was grounded.—(Merrell *v.* Smith, Cro. Jac. 311.—Jenk. 341.)

(*b*) Doe d. Hardman *v.* Pilkington, Burr. 2447, and the cases there cited.

(*c*) Anon., Salk. 257; S. C., 6 Mod. 130; Scrape *v.* Rhodes, Barn. 8; Driver *v.* Scratton, Barn. 17; Kesworth *v.* Thomas, And. 208; Thrustout *v.* Gray, Cas. Temp. Hard. 165.

(*d*) Doe d. Lewis *v.* Coles, 1 R. & M. 380; vide 1 Chitty, 535, note (*a*), and Doe d. Manning *v.* Hay, 1 M. & Rob. 243.

(*e*) Doe d. Hardman *v.* Pilkington, Burr. 2447.

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[1] Where a judgment in ejectment rendered in the late general court, [Maryland,] in 1803, had been stayed by injunction, and the case brought to and affirmed in the court of appeals, on appeal from chancery, the term of the demise laid in the declaration was enlarged. Turner et al. *v.* Wartington, 5 Harr. & Johns. Rep. 437. (*In nota.*)

A motion to enlarge the term of the demise in an action of ejectment, wherein judgment had been rendered in the late general court, [Maryland,] in 1790, refused at June term, 1822, of the court of appeals. Frazier et al. Lessee *v.* Hall, 5 Harr. & Johns. Rep. 437.

the demise was laid anterior to the time of the forfeiture, the Court permitted the lessor to amend, (upon payment of costs,) after the record was made up, and the cause set down for trial.(*a*)[1] So, *also, a

(*a*) Doe d. Rumford *v.* Miller, K. B. H. T. 1814, MS. This case seems to carry the principle of allowing an amendment of the demise in an ejectment to its utmost limit. The ejectment was brought upon a covenant to finish certain buildings in a workmanlike manner before the 29*th of Sept.* 1813. The demise was laid *on the* 26*th day of March*, 1813, and the declaration delivered *on the* 29*th of Oct.* 1813. The cause was set down for trial, at the first sittings in Middlesex, in Hilary Term, 1814; but stood over until the second sittings. And two days before the second sittings, a rule to show cause why the day of the demise should not be altered to the 30th of Sept. was obtained; and made absolute immediately before the rising of the Court on the morning of the second sittings.

A party having been prevented from suing out execution in an ejectment, by an injunction in chancery, which continued in force for many years, during which the term in the declaration in ejectment expired, the court would not permit it to be enlarged, unless it were quite clear that the amendment would work no injustice to the opposite party. Bradley et al. *v.* Husseldon ex dem. Harper et al., 1 Barn. & Cress. Rep. 121.

In ejectment the demise cannot be enlarged after judgment and expiration of the demise, although the proceedings were stayed by injunction. Owings *v.* Marshall, 3 Bibb's Rep. 27.

[1] Declaration in ejectment amended by altering the time of the demise, which was laid before the title accrued, upon payment of the costs of the motion, though the cause had been twice brought to trial; on the first trial, the plaintiff was non-suited, and a new trial granted; on the second trial, the defendant objected, for the first time, that the demise was laid before the title accrued, and moved for a non-suit; the judge overruled the objection; the defendant excepted, and the judge signed a bill of exceptions upon the point. Jackson ex dem. Hills *v.* Tuttle, 6 Cow. Rep. 590.

Upon the trial of an ejectment, the plaintiff offered in evidence a deed to his lessors, bearing date after the demise laid in the declaration, to the admission of which deed the defendant objected, but the court admitted it to be read in evidence, saying, the date of the demise was immaterial, or the plaintiff might amend his declaration, which he did before the jury retired from the bar, by altering the date of the demise. Upon a bill of exceptions taken upon this point, the supreme court of the United States held, that the amendment "was properly allowed." Although, the supreme court was "of opinion that the circuit court erred in saying that it was unnecessary to prove a title in the lessor of the plaintiff at the date of the demise laid in the declaration." Blackwell *v.* Patton & Erwin's Lessee, 7 Cranch's Rep. 472, 478.

The time of the demise may be amended after non-suit, on the ground that the lessor of the plaintiff was a *feme covert* at the time of the demise. Den ex dem. Hoover *v.* Franklin et al., 2 South Rep. 850.

If the term of a demise in the declaration, in an action of ejectment, expired before the verdict and judgment in the court below, the judgment is erroneous, and, on appeal, will be reversed. Roseberry & Stevens *v.* Seney et al. Lessee, 3 Harr. & Johns. Rep. 228.

In such case, the court below, under a *procedendo* directing a new trial, may enlarge the term of the demise. Ib.

After judgment, the record amended by enlarging the time in the demise which had expired, for the purpose of carrying the judgment into effect. Den *v.* Taylor, 2 Green's Rep. 81.

[*227] new count has been permitted[1] upon a new demise *after three Terms had elapsed and the roll had been made up and carried in.(a)

(a) Doe d. Beaumont *v.* Armitage, 1 D. & R. 173; 2 Chit. 302.

The court will not consider a new demise, made after the commencement of the suit, error, unless excepted to in the court below. Winn *v.* Wilhilte, 5 Marsh. Rep. 522. (New Series.)

An amendment may be made to a declaration in ejectment, so as to change the demise from a joint one, by all the lessors, to separate demises, for undivided portions. Hutching *v.* Talbot et al. Lessee, 3 Harr. & Johns. Rep. 378.

The change of the name of the fictitious lessee, in the amended declaration, is of no consequence, the defendant having afterwards appeared to it and entered into the common rule. Ib.

Quære. If it may not then be considered a new action. Ib.

[1] In ejectment, an amendment, so as to enlarge the term laid in the declaration, will be permitted in the discretion of the court; but, where a court refuses to allow such amendment, it is no ground for writ of error. Walden ex dem. Denn *v.* Craig, or, rather, Denn ex dem. Walden *v.* Craig, 9 Wheat. Rep. 576.

That the term stated in a declaration in ejectment, has expired, previous to the decision on an appeal, is a circumstance of no importance. Baker *v.* Seekright, Lessee of Glasscock, 1 Hen. & Munf. Rep. 177.

In ejectment, if the term stated in the declaration expire, before the decision of the cause, the practice is, to grant leave to amend the declaration by enlarging the term. Hunter *v.* Fairfax's devisee, 1 Munf. Rep. 218.

Before trial, the declaration in ejectment may be amended, by enlarging the term, or adding a new demise, on payment of costs. Lion ex dem. Eden et al. *v.* Burtiss et al., 18 Johns. Rep. 510.

But, where there was an actual entry and actual lease, for the purpose of avoiding a fine, and the demise in the declaration was, by mistake, laid on the first, instead of the sixth, day of May: the court, in allowing the amendment, gave the defendant leave to elect, within twenty day, whether to defend the suit or not; and, if he choose to defend, then to have the costs of the amendment only; but if he abandoned his defence, then he should have costs to the time of his election. Ib.

Quære. Whether the judge, at the trial, can allow the amendment, in such a case? Ib.

If the objection, on the ground of variance, is made at the trial, and the plaintiff is non-suited, it seems that the court will set aside the non-suit, and give leave to amend, on payment of costs. Ib.

Where the judge, at the trial, refused a non-suit, but reserved the question as to the variance, and the defendant went into his defence fully, at the trial, the plaintiff was allowed, after verdict, to amend his declaration, on the usual terms, under the circumstances of the case, it being a mere clerical mistake. Ib.

In ejectment, if the lease laid in the narr. have expired, the enlargement of it is an amendment, in matter of form, and it is error, under act of March, 1806, [Pennsylvania,] if the court refuse. Maus' lessee *v.* Montgomery, 10 Serg. & R. Rep. 192.

Where a statement was filed against one defendant only, before the first term, and, afterwards, the sheriff added the name of another person found in possession, as defendant, according to the acts of assembly; it was held, that the statement was good, and that, if it was necessary to add the name of the other defendant, the court below might have permitted

But this permission is not to be extended to the injury of the defendant, and therefore the Court will not suffer the demise to be altered to a day subsequent to the day of the delivery of the declaration, for this would be to give the lessor of the plaintiff a right of action which did not subsist at the time of the commencement of his suit.(*a*)

In like manner amendments have been permitted in the description of the premises, as by altering the parish from the parish of G. to "the parish of St. John in G."(*b*) and by striking out after judgment and writ of error brought, where the ejectment was brought for "twenty messuages, twenty tenements, &c.," the words "twenty tenements."(*c*) At a similar stage of the cause also an amendment has been allowed by the insertion of a local description of the premises, when *all* local description had been previously omitted.(*d*)

In like manner the term has been enlarged after its expiration *upon payment of costs, although the issue was made up, [*228] the special jury struck, and the cause gone down to trial, before the mistake was discovered; the Court considering, that it was a plain mistake in the declaration, and might be amended by the writ, which spoke of a term not yet expired.(*e*)

*An enlargement of the term was also permitted, by Lord Mansfield, in a case where a judgment in ejectment in Ireland had been affirmed,

(*a*) Doe d. Foxlow *v.* Jeffries, K. B. M. T., 1814, MS.
(*b*) Doe d. O'Connell *v.* Porch.—*Coram* Heath, J. Trin. Vac. 1814, MS.
(*c*) Doe d. Lawrie *v.* Dyeball, 1 M. & R. 330; 8 B. & C. 70, *ante*, p. 22.
(*d*) Doe d. Rodgers *v.* Bath, 2 N. & M. 440.
(*e*) Roe d. Lee *v.* Ellis, Blk. 940.

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an amendment accordingly, even after verdict and judgment, and the supreme court would consider such an amendment as having been made. Irish et al. *v.* Scovell, 6 Binn. Rep. 55.

Where judgment in ejectment has been entered in the common pleas, and possession delivered after the expiration of the term laid in the declaration, this court [supreme court of Pennsylvania,] permitted the term to be enlarged by the defendant in error, on paying the costs of the writ of error. Riddle, Esq. *v.* Lessee of Findley, et al., 6 Serg. &. R. Rep. 227.

A motion to enlarge the term in ejectment, in order to support an execution, was refused, after a lapse of thirteen years from the judgment, and five years from the expiration of the term, and after a new party had come into possession. Campbell et al. Adm.'rs, &c., *v.* Grantz's Lessee, 6 Binn. Rep. 115.

Where the term laid in the declaration expires after verdict for the plaintiff, and a rule to show cause why a new trial should not be granted, the court will allow it to be granted. Lessee of Woods *v.* Galbreath, 2 Yates Rep. 536.

upon a writ of error, in the King's Bench in England, but, from various delays, the term in the declaration had expired before the plaintiff's lessor could obtain possession ;(*a*) but in a late case, where a vast number of years had been allowed to elapse (nearly fifty) from the date of the original judgment, the Court would not allow the term to be enlarged upon affidavits, stating that the cause had been staid in Chancery by injunction, and that from want of funds the original parties to the suit had been unable to proceed, and suggested that the proper course would be to apply to the Lord Chancellor, who might, if the case required it, order the parties to consent to the amendment.(*b*) And in another case, where, after a period of twenty years had elapsed from the date of the judgment, the lessor applied for permission to enlarge the term in order that he might sue out a *scire facias* to revive the judgment and obtain possession, the Court not only refused the rule, but Abbott, C. J., stated that he very much doubted whether in such a case the Court ought to allow the *scire facias* to issue, even if the term had not expired.(*c*)

When the old principles of the action prevailed, and the term was considered substance, and not amendable, the plaintiff was not nonsuited if the term expired before the trial, but was permitted to proceed for his damages and costs, though not for the recovery of his land; for the right to damages for the ouster remained, although the right to possession upon the lease was determined.[1] It is not probable at the present day, that opportunity will be offered to raise a point of this nature, but if the lessor of the plaintiff should act so negligently as to proceed to trial upon an expired term, there seems no

(*a*) Vicars *v.* Heydon, Cowp. 841.
(*b*) Bradney *v.* Hasselden d. Harper, 1 B. & C. 121.
(*c*) Doe d. Reynell *v.* Tuckett, 2 B. & A. 773.

[1] When the term of the plaintiff in ejectment expires before the trial, although possession of the property cannot be recovered, yet, he may proceed for damages for the trespass and for the *mesne profits*. Lessee of Brown v. Galloway, 1 Peter's Circ. Ct. Rep. 291, 299.

The general rule is, that a plaintiff in ejectment shall recover according to his right at the time of the suit brought; but, if pending the suit, his title is divested either by act of law or by his own act, he shall not recover possession adverse to the will of the party in whom the title is vested, but he is entitled to his damages and costs. Lessee of Rugan et al. v. Philips et al., 4 Yeates' Rep. 382.

So, a plaintiff in ejectment brought under the acts of 1806 and 1807, may recover the nominal damages and full costs although he has conveyed the title to a third person, pending the suit. Murray v. Garretson, 4 Serg. & R. Rep. 130.

reason *why the above-mentioned principle should not be applicable to the modern practice.(a)

OF THE NOTICE TO APPEAR.(b)

*The name of the tenant in possession must be prefixed to the notice;[1] and, when the possession of the disputed premises is divided amongst several, it is usual to prefix the names of all the tenants, to each separate declaration; although it is not necessary to prefix more than the name of the individual tenant, upon whom the particular declaration is served.(c) The notice should contain the Christian and surnames of the tenant or tenants in possession, and a notice addressed "*To Mrs. Hicks*" has been held insufficient;(d) but a different rule seems now to prevail, and it is to be collected from the sum of the recent cases, although some of them contain special facts as to the mode of service, that the insertion of a wrong Christian name, or [*229]

(a) Capel *v.* Saltonstall, 3 Mod. 249.
(b) Appendix, No. 13.
(c) Roe d. Burlton *v.* Roe, 7 T. R. 477; Doe d. Field *v.* Roe, 1 Har. & W. 516.
(d) Doe *v.* Roe, 1 Chitty, 573.

[1] The Revised Statutes of New York, 4th ed., (Banks, Gould & Co., 1852,) p. 573, provide that, where a person has been in actual possession of real estate, for three years, claiming the same in fee, or for life, or for years not less than ten, he may enforce his title against a person claiming any estate in fee, or for life, or for a term of years not less than ten, as follows:

Sec. 2. "He shall serve a notice, subscribed with his name and place of residence, on such claimant, stating,

1st. His right to the premises demanded in a brief manner, and whether his estate therein is in fee or for life, or for a term of years not less than ten, and whether he holds the same as heir, devisee, or purchaser, with the source or means by which his right immediate accrued to him.

2nd. The premises claimed, with the same certainty as herein before required in a declaration in ejectment:

3rd. That such premises then are, and, for the three years preceding such notice, have been in his actual possession, or in the actual possession of himself and those from whom he derives his title: and,

4th. That the person to whom such notice is directed, unjustly claims title to such premises; and that, unless such person appear in the supreme court, within the time, and assert his claim, in the manner provided by law, he, and all persons claiming under him, will be forever barred from all claim to any estate of inheritance or freehold, or for a term of years not less than ten, in possession, reversion, or remainder, to the premises described in such notice."

Notice in ejectment is in the nature of process, and cannot be aided by any statement of the person serving the declaration, or by the defendant's appearing and excepting, unless they also enter into the common rule. Craig *v.* Clarke, 3 Marsh. Rep. (Ky.) 252.

the omission of the Christian name altogether, will not invalidate the notice,(*a*) and the reason for this rule seems to be, that the defendant would otherwise have the advantage of a plea in abatement which never is allowed in this action.(*b*) But a notice directed "*to the personal representatives of A. B.*, (*the deceased tenant,*)(*c*) or addressed to *A. B.*, and served upon C. D. will be insufficient.(*d*)

[*230] *The notice will be sufficient, although the address of the tenant be omitted, provided the tenant was duly served with a copy of the declaration before the first day of Term, and acknowledged such service.(*e*)

The notice must require the tenant to appear, and apply to the Court to be admitted defendant instead of the casual ejector, within a certain time after the declaration is delivered;[1] and when the provisions of the statute 1 Geo. IV. c. 87, s. 1, are resorted to, the notice must also inform the tenant that he will be required to enter into a recognizance with two sufficient sureties, in such reasonable sum as the Court shall direct, to pay the costs and damages which may be recovered in the action.

The time when the notice should require the tenant to appear and apply to be made defendant, is regulated by the locality of the premises; unless the proceedings are regulated by statute 1 Wm. IV. c. 70, s. 36, when the notice must invariably require the tenant to appear *within ten days* after the delivery of the declaration.

In all other cases when the premises are situated in London, or Middlesex, the notice should be for the tenant to appear "on the

(*a*) Doe d. Warne *v.* Roe, 2 Dow. B. C. 517; Doe d. Folkes *v.* Roe, 2 Dow. P. C. 567; Doe d. Frost *v.* Roe, 3 Dow. P. C. 563; Doe d. Peach *v.* Roe, 6 Dow. P. C. 62; Doe d. Smith *v.* Roe, 6 Dow. P. C. 629; Doe d. Smart *v.* Roe, 9 Dow. P. C. 340; Doe d. Messer *v.* Roe, 5 Dow. P. C. 716; Anon., 1 Chitty, 573, note (*a*).

(*b*) Doe d. Stanton *v.* Roe, 6 M. & S. 203.

(*c*) Doe d. Governors of St. Margaret's Hospital *v.* Roe, 1 B. Moore, 113; Doe d. Paul *v.* Hurst, 1 Chitty, 162.

(*d*) Doe d. Smith *v.* Roe, 5 Dow. P. C. 254.

(*e*) Doe d. Pearson *v.* Roe, 5 B. Moore, 73.

[1] Notice in ejectment to the defendant to appear "on the first day of the next term of the —— circuit court," without naming the court, is bad. Beall v. Siverts, 1 Marsh. Rep. (Ky.) 154.

first day" of the Term *next after the delivery of the declaration, specifying the Term by name; but it will be sufficient if the notice be to appear *generally* of the Term, though in such case the tenant will have the whole Term to appear in.[1] [*231]

When the premises are situated elsewhere than London or Middlesex, the notice should require the tenant to appear generally in the Term next ensuing the delivery of the declaration, naming also the Term as before directed, though it will be sufficient, when the proceedings are in the Common Pleas, if *it require him to appear in the *issuable* Term, next ensuing such delivery, although a non-issuable Term intervene.(*a*)

It is not advisable to deviate from these general forms; but there are cases in which the Courts have allowed other forms to prevail. Thus, a notice to appear "in the beginning of the Term,"(*b*) to appear "in next Hilary," omitting the word Term,(*c*) to appear "within ten days," being served immediately before Term,(*d*) have been held sufficient; and where the notice was to appear "next Easter Term," and was dated May 13, and the affidavit of service stated that it had been explained to the tenant that he was to appear in the next Trinity Term, the Court granted a rule *nisi*;(*e*) but notice to appear "on the morrow of the Holy Trinity,"(*g*) or "in eight days of St. Hilary,"(*h*) and to appear "in due time," have been held insufficient.(*i*)

Where a declaration delivered in Easter Vacation *was entitled of *Easter* Term, and the notice was to appear on the first day of *next* Term, the Court granted the common rule for judgment against the casual ejector during *Easter* Term.(*k*) Where, also, the [*232]

(*a*) Doe d. Clarke *v.* Roe, 4 Taunt. 738.
(*b*) Tredder *v.* Davis, Barnes, 175.
(*c*) Doe d. Diamond *v.* Roe, 8 Dow. 308.
(*d*) Anon., 1 Dow. P. C. 18.
(*e*) Doe d. Symes *v.* Roe, 5 Dow. P. C. 667.
(*g*) Sel. N. P. 640.
(*h*) Lackland d. Dowling *v.* Badland, 8 Moore, 79.
(*i*) Doe d. Isherwood *v.* Roe, 2 Nev. & M. 476.
(*k*) Anon., K. B., E. T. 1817, MS.

[1] The notice at the end of the declaration in ejectment may be amended after service, by striking out one day and inserting another. Den *v.* Laring, 4 Halstead's Rep. 254.

notice had been given by mistake for *Hilary* instead of *Trinity* Term, and the tenant was afterwards informed of the mistake, a rule *nisi* was granted ;(*a*) and in a subsequent case, upon a similar error, Holroyd, J., granted the common rule.(*b*) Where, also, the declaration was by original, and the notice was as if by bill, omitting "wheresoever, &c.," the variation was held immaterial.(*c*) But where the notice was to appear *in *eight days of St. Hilary*, instead of *Hilary* Term generally, the Court refused the rule;(*d*) as they also did where the declaration was entitled *in the King's Bench*, and the notice was to appear in the *Common Pleas* ;(*e*) though a rule *nisi* has since been granted in a precisely similar case.(*g*)

[*233] The notice should regularly be subscribed with the *name of the casual ejector, and, formerly, proceedings have been set aside for an irregular signature; but it is now sufficient if the notice be subscribed with the name of the nominal plaintiff, or of the lessor, or of any other person.(*h*)

In a case where two notices were annexed, one in the usual form, and the other requiring the tenant to appear, and enter into recognizance pursuant to 1 Geo. IV., c. 87, the Court granted the common rule, allowing the plaintiff to treat the second notice as surplusage.(*i*) [1]

There are only two reported cases in which amendments have been made, by rule of Court, in the notices subscribed to the declaration;

(*a*) Anon., 2 Chitty, 171.
(*b*) Doe d. Greaves, 2 Chitty, 172.
(*c*) Doe d. Thomas *v.* Roe, 2 Chitty, 171.
(*d*) Lackland d. Dowling *v.* Badland, 8 B. Moore, 79.
(*e*) Doe d. Lewis *v.* Roe, K. B., M. T. 1821, MS.
(*g*) Doe d. Evans *v.* Roe, 9 Dow. P. C. 998.
(*h*) Peaceable *v.* Troublesome, Barn. 172; Hazlewood d. Price *v.* Thatcher, 3 T. R. 351; Goodtitle d. Duke of Norfolk *v.* Notitle, 5 B. & A. 849.
(*i*) Doe d. Roberts *v.* Roe, 5 Dow. P. C. 508.

[1] The notice to the tenant in possession, at the foot of the declaration in ejectment, need not be in the name of the plaintiff; but, if in the name of the lessor of the plaintiff, or even any other person, the court will permit the rule for judgment against the casual ejector to be drawn. Goodtitle dem. Duke of Norfolk v. Notitle, 5 Barn. & Ald. Rep. 849.

Where several tenants have been duly served with a copy of a declaration in ejectment, judgment may be entered against the casual ejector, although the notice at the foot of the declaration was not addressed to any or either of such tenants. Doe ex dem. Pearson v. Roe, 5 Moore's Rep. 73.

but it cannot be doubted that any amendments would now be allowed, which the justice of the case might require. Thus, an amendment was permitted in a country cause, where the notice was to appear in *Michaelmas* Term, when, according to the practice in country causes at that time, it should have been to appear in an issuable Term, and the affidavit stated, that if the lessor were not permitted to amend, he would be barred by the Statute of Limitations from bringing a new ejectment. A rule *nisi* was in the first instance granted, *which on showing cause was made absolute.(*a*) And a like course was pursued where the words "or you will be turned out of possession of the same," had been omitted in the notice.(*b*)

(*a*) Doe d. Bass *v.* Roe, 7 T. R. 469.
(*b*) Doe d. Darwent *v.* Roe, 3 Dow. P. C. 336.

*CHAPTER VII.

Of the Service of the declaration and Proceedings to Judgment against the Casual Ejector when no appearance.

THE declaration in ejectment being considered by the courts as a kind of writ or process, the rules by which its delivery to the tenant in possession are regulated resemble the service of a writ rather than the delivery of a declaration. It is in truth a substitute for a writ, and is the only warning which the tenant receives of the proceedings of the claimant.[1] The courts, therefore, before they authorize a judgment to be entered against the casual ejector, require full proof that the declaration has been duly received by the tenant, and that its nature and contents were explained at the time of the service.

Our next inquiry will be directed to the different incidents attendant upon this service, and the different modes by which it may be effected.

The service of the declaration, (except when the proceedings are under the stat. 1 Wm. IV. c. 70,(*a*) when the service must be within

(*a*) *Vide post*, chap. 12.

[1] Serving the declaration is the commencement of the action of ejectment. Baron *v.* Abeel, 3 Johns. Rep. 481; Pindell *v.* Maydwell, 7 B. Mon. Rep. 314.

The commencement of an ejectment is the service of notice, and the seven years' limitation [Kentucky] does not apply to ejectments brought before the first of January, 1816. Taylor et al. *v.* Taylor et al., 3 Marsh. Rep. (Ky.) 19.

In ejectment, the declaration and notice must be entered on the record at the term it is returnable, or it is discontinued; and proceedings, at a subsequent term, are irregular, though, when noted on record at the proper term, the suit has relation to the service of the notice. Stair *v.* Pickets, 3 Marsh. Rep. (Ky.) 551.

The service of a declaration is not equivalent to a demand of possession. Den *v.* Westbrook, 3 Green's Rep. 371.

Where a printed declaration and notice, in ejectment, were served upon an illiterate tenant, who was told merely that they were a declaration in ejectment, without any further explanation, but it appeared, from circumstances, that he must have known the nature of the papers, the court considered this equivalent to a technical service. Jackson ex dem. Beaver v. Stiles, 1 Cow. Rep. 222.

ten days next after the title has accrued,) must be effected *before* the first day of the term in which the notice at its foot directs the tenant to appear ;(*a*) and whensoever Easter may fall, April 15 is always, for this purpose, reckoned the first day of *Easter* term.(*b*) It must either be served personally upon the tenant in possession of the premises *at the time of the service*, or satisfactory proof given by affidavit on the motion for *judgment against the casual ejector, either that it duly reached his hands within the proper time, or that the service could not be duly effected.[1]

The power exercised by the courts in granting rules for judgment against the casual ejector is entirely discretionary ; and they correctly watch with the utmost jealousy every deviation from the rule requiring personal service. This due attention on their part to the interests of the party in possession, has given rise to many minute and to some almost imperceptible distinctions in the reported judgments ; but the governing principle of all the decisions is, that unless the Court be thoroughly satisfied that the tenant in possession *at the time of the service*, has been duly served with the declaration at the proper time, or that the utmost diligence has been used to effect such service, the rule for judgment against the casual ejector will not be granted.

The modern cases upon these points are singularly numerous, and they may be arranged under the following heads, namely : when there are two or more tenants in possession, or the possession is held by the

(*a*) Reg. Gen. Trin. Term, 1831.
(*b*) Doe d. Frodsham *v.* Roe, 6 Dow. P. C. 479.

[1] Where a defendant, on being served with a declaration in ejectment, assented to the character of tenant in possession, and afterwards appeared and pleaded : held, that it was quite sufficient evidence for a jury to find that he was the tenant in possession, although it also appeared that he was in the situation only of a servant, and managed the business for the real owner on the premises. Doe ex. dem. James et al. v. Stanton, 2 Barn. & Ald. Rep. 371.

It must appear, from the affidavit of service, that the persons on whom the service was made, were tenants in possession, and that they were served with copies of the declaration and notice. Wharton v. Clay, 4 Bibb. 167.

Proof that the copy declaration was served upon "A. B., said to to be one of the directors of, " &c., insufficient. Den. v. Fen. 5 Halst. 237.

Proof that the service was on the daughter of the tenant, without showing that such service was made on the premises in question, is insufficient. Ib. 7 Halst. 321.

A return upon the writ of "*executed*," is no evidence of the service of the declaration. Cravins v. Armour, 6 Yerger 467. See Lytle v. Fen.; 3 M'Lean 411.]

tenant in some peculiar capacity; when the tenant is bankrupt, or lunatic; when the service is on an agent, attorney, or bailiff; when the tenant is dead, or has absconded; when the service is upon the wife of the tenant, or a member of, or servant in his family; when the service is prevented by fraud or violence; and when the premises are entirely deserted.

[*235] *When personal service has been effected, it is immaterial whether it be upon the demised premises or elsewhere,(a) or whether the party is or is not living within the jurisdiction of the court;(b) but it must be remembered, that the service must *be upon the party in possession *at the time of the service*, so that when the ejectment is brought by a landlord against his tenant, and the tenant has underlet the premises, the service must be upon the under-tenant, or under-tenants if more than one, and a service upon the original tenant will not be sufficient.(c)[1] But if the service is upon the original tenant, and he appears and pleads, he cannot afterwards release himself from the action, upon the ground that his under-tenants, and not himself, are in possession.(d)

[*237] *When several persons are jointly in possession, the service ought in strictness to be upon each party separately;(e)[2] but the general rule seems to be, although some exceptions are to be

(a) Savage *v.* Dent, Stran. 1064; Taylor *v.* Jefts, 11 Mod. 302.
(b) Doe d. Daniel *v.* Woodroffe, 7 Dow. P. C. 494.
(c) Roe d. Lord Darlington *v.* Cock, 4 B. & C. 259.
(d) Roe *v.* Wiggs, 2 N. R. 330.
(e) B. N. P. 98.

[1] Where the service is made upon the tenant in possession, and he neglects to give notice to his landlord, and suffers judgment to go by default, it will not be disturbed for that cause. Breeding *v.* Taylor, 6 B. Mon. Rep. 62.

Service of notice in ejectment upon the land which was occupied by the slaves of the defendant, was held good, although the defendant resides elsewhere. Doe ex dem. Clay et al. v. Woods et al., Marsh. Rep. (Ky.) 152.

Service of a declaration in ejectment on the servant of the tenant in possession, with a subsequent acknowledgment from the attorney of the latter, that the declaration had been received, is sufficient for judgment *nisi* against the casual ejector. Doe ex dem Teverell v. Snee, 2 Dowl. & Ryl. Rep. 5.

See Marvin v. Dennison et al., 20 Verm. Rep. 662.

In ejectment for premises which had been demised on lease to one person, who had underlet to others, it was held to be necessary to serve all the under-tenants with a copy of the declaration. Doe ex dem. Ld. Darlington v. Cock, 4 Barn. & Cress. Rep. 259.

[2] Several tenants, claiming severally parts of the land sued for, may be sued in one

found,) that service upon one of two joint tenants is sufficient:(*a*) but that when the parties in possession are not joint tenants, then the common rule will be granted against the parties actually served, and a rule *nisi* against the other parties.(*b*)

Service on one of several partners has been held sufficient against all,(*c*) and so has service on one of two tenants who said the other was only his servant.(*d*)[1] But service upon A. B., where the notice is addressed to C. D., although both be tenants, will be insufficient;(*e*) and in one case of service upon one of two joint tenants, who were also partners in trade, a rule *nisi* only was granted.(*g*)

*Service of the declaration on the secretary of the East India Company, in respect of premises sought to be recovered from the company, but who did not reside on the premises, is sufficient;(*h*) as also service on the secretary of a company incorporated by act of Parliament, enacting generally that service upon such secretary should be good as against the company.(*i*) So, also, service *at the London station* upon an officer

(*a*) Doe d. Williams *v.* Roe, 10 Moore, 493; Doe d. Clothier *v.* Roe, 6 Dow. P. C. 291; Doe d. Hutchinson *v.* Roe, 2 Dow. P. C. 418.

(*b*) Right *v.* Wrong, 2 Chitty, 175; Doe d. Field *v.* Roe, 2 Chitty, 174; Anon., 2 Chitty, 176; Doe d. Bromley *v.* Roe, 1 Chitty, 141; Doe d. Elwood *v.* Roe, 3 B. Moore, 578; Doe d. Bailey *v.* Roe, 1 B. & P. 369; Doe d. Grimes *v.* Roe, 4 Dow. P. C. 86, 591.

(*c*) Doe d. Overton *v.* Roe, 9 Dow. P. C. 1039; Doe d. Tomkins *v.* Roe, W. W. & D. 49; Doe d. Hall *v.* Roe, W. W. & D. 392.

(*d*) Doe d. Sheppard *v.* Roe, W. W. & D. 75.

(*e*) Doe d. Smith *v.* Roe, 5 Dow. P. C. 255; 2 R. & W. 332.

(*g*) Doe d. Field *v.* Roe, 2 Chit. 17.

(*h*) Doe d. Coopers' Company *v.* Roe, 8 Dow. P. C. 134.

(*i*) Doe d. Bromley *v.* Roe, 8 Dow. P. C. 858.

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action of ejectment. Camden et al. v. Haskill, 3 Rand. Rep. 462; White v. Pickering, 12 Serg. & Rawle, 435.

An ejectment may be brought against several persons in possession of any part of the tract of land claimed by the lessor of the plaintiff. Stewart's Heirs, &c. v. Coalter, 4 Rand. Rep. 74.

Several defendants may be joined in one suit in ejectment, where the plaintiff's title in relation to all is the same, although their possession be several and not joint; each defendant may be found separately guilty for the part of the premises in his possession, and the plaintiff have judgment against them severally. Jackson v. Andrews, 7 Wen. 152.

Ejectment may be brought against several persons occupying different rooms in plaintiff's house. Marshall v. Wood, 5 Verm. 250.

[1] If all the defendants live in the same house, and this appears by the marshal's return, it is sufficient to deliver one copy. Campbell v. Harper, 3 Wash. C. C. Rep. 356.

of the Southampton Railway Company, who was sworn to be in possession of the premises.(*a*) So, also, service upon the book-keeper of a company, who occupied part of the premises sought to be recovered;(*b*) and where service was upon the clerk of an incorporated company, not empowered to sue and be sued in the name of their clerk, on a portion of the premises sought to be recovered, although such clerk was not resident thereon, it was held sufficient for a rule *nisi*.(*c*) So, also, service upon the clerk of a canal company, at the office of the company, where the action was to recover part of the bed of a canal.(*d*) But where the action was to recover land illegally taken into a road under a private act of Parliament, and the service was upon *one* of the commissioners in whom the road was vested and their clerk, the rule was refused altogether.(*e*)

When property in possession of parish officers is rented by them, for the purpose of accommodating the parish poor, service upon the churchwardens and overseers will be sufficient, although they do not occupy the house otherwise than by placing the poor in it.(*g*) But service upon one of them only will not avail.(*h*)

*In ejectments to recover possession of dissenting meeting-houses, service on the minister and one of the trustees,(*i*) on the trustees and at the meeting house,(*k*) on the trustees and the sexton who holds the keys,(*l*) on a surviving lessee and a sextoness,(*m*) and on an officiating minister and a party paying the chapel rates,(*n*) have been held sufficient. In some of these cases, rules absolute were granted in the first instance, in other rules *nisi*, but the reasons for these differences are not perceptible.

(*a*) Doe d. Martyns *v.* Roe, 6 Scott, 610.
(*b*) Doe *v.* Roe, 1 Dow. P. C. 23.
(*c*) Doe d. Ross *v.* Roe, 5 Dow. P. C. 147.
(*d*) Doe d. Fisher *v.* Roe, 10 M. & W. 21.
(*e*) Doe d. White *v.* Roe, 8 Dow. P. C. 71.
(*g*) Tupper d. Mercer *v.* Doe, Barnes, 181.
(*h*) Doe d. Weeks *v.* Roe, 5 Dow. P. C. 405.
(*i*) Doe d. Smythe *v.* Roe, 8 Dow. P. C. 509.
(*k*) Doe d. Gray *v.* Roe, 7 Dow. P. C. 700.
(*l*) Doe d. Scott *v.* Roe, 6 Scott, 732; Doe d. Dickens *v.* Roe, 7 Dow. P. C. 121.
(*m*) Doe d. Kushner *v.* Roe, 7 Dow. P. C. 97.
(*n*) Doe d. Earl Somers *v.* Roe, 8 Dow. P. C. 292.

In ejectments for free-schools, service upon the master, and sticking the declaration on the door, and service on a person resident in the school-house, have been held good services.(*a*)

When the tenant has become bankrupt, service on the official assignee only, and on a person "representing himself" as messenger in possession, has been held sufficient service to warrant the ordinary rule;(*b*) whereas service upon all the assignees, upon the tenant himself, and upon the messenger, has been held only sufficient for a rule *nisi*.(*c*)

If the tenant in possession be a lunatic, the service should, notwithstanding, be upon him, although he be confined in a lunatic asylum:(*d*) unless he has been found lunatic, in which case it seems the service should be on his committee.(*e*) Service upon the daughter,(*g*) or servant,(*h*) is insufficient; but *in a case, where C., who lived with the lunatic and transacted his business, would not permit the deponent to have access to him, whereupon he delivered the declaration to C., the court granted a rule *nisi* against the lunatic and C., and held the service on C. to be good service.(*i*)

Where the tenant was personated, at the time of the service, by another, who accepted the service in the tenant's name, the court granted a rule *nisi*, and directed that leaving a copy of the rule at the house, with some person there, or, if no one was to be met with, affixing it to the door, should be good service.(*k*) But service on a person who asserts that he is owner, and that there is no tenant in possession, is not alone sufficient, even for a rule to show cause.(*l*)

Service upon an agent is insufficient, unless the tenant is resident abroad, or has absconded to another country, or keeps out of the way to prevent service (*m*)

(*a*) Doe d. Smyth *v.* Roe, 8 Dow. P. C. 509; Doe d. Earl Somers *v.* Roe, 8 Dow. P. C. 292.
(*b*) Doe d. Baring *v.* Roe, 6 Dow. P. C. 456; Doe d. Johnson *v.* Roe, 1 Dow. P. C. 493.
(*c*) Doe d. Chadwick *v.* Roe, 9 Dow. P. C. 492.
(*d*) Doe d. Gibbard *v.* Roe, 9 Dow. P. C. 844; Doe d. Brown *v.* Roe, 6 Dow. P. C. 270.
(*e*) Anon., Lofft. 401.
(*g*) Doe d. Kushner *v.* Roe, 7 Dow. P. C. 97.
(*h*) Doe d. Earl Somers *v.* Roe, 8 Dow. P. C. 292.
(*i*) Doe d. Lord Aylesbury *v.* Roe, 2 Chitty, 163.
(*k*) Fenn d. Tyrrell *v.* Denn, Burr. 1181.
(*l*) Doe d. Davis *v.* Roe, 1 Price, P. C. 11.
(*m*) Doe *v.* Roe, 4 B. & A. 653; Doe d. Treat *v.* Roe, 4 Dow. P. C. 278; Doe d. Tomkins *v.* Roe, W. W. & D. 49; Doe d. Robinson *v.* Roe, 3 Dow. P. C. 11; Doe d. Morpeth *v.* Roe, 3 Dow. P. C. 570.

Service upon a person appointed by the Court of Chancery to manage an estate for an infant, although the estate consisted of a large wood, of which no tenant was in possession, has been held insufficient;(*a*) but it would seem that service upon a bailiff, who delivers the declaration over to the tenant's attorney, or upon the tenant's attorney himself, accompanied by an undertaking on the part of the attorney, to appear to the action, will be sufficient foundation for a rule *nisi*.(*b*)

*When the tenant is dead, in order to make service upon his representatives sufficient, they should be addressed by name in the notice; and the affidavit should state them to be tenants in possession. If this cannot be done the lessor should proceed under the stat. 11 Geo. II. c. 19, as in case of a vacant possession; and if a servant of the deceased tenant remains on the premises and resists the claimant in his endeavors to obtain possession, he may be treated as tenant, and the declaration served upon him as such.(*c*) And where the premises were held by lease, and the lessee was dead, and the ejectment was brought for a forfeiture, service on the administratrix, to whom it was sworn that it was believed that the interest in the lease passed, and on the person in possession of the premises, was held good service.(*d*)

When the tenant has absconded, services upon the wife,[1] upon a broker having the key of the house with instructions to let it, upon the

(*a*) Goodtitle d. Roberts *v.* Badtitle, 1 B. & P. 385.

(*b*) Jenny d. Mills *v.* Cutts, 1 Scott, 52; Anon., 1 Chitty, 181; Doe d. Collins *v.* Roe, 1 Dow. P. C. 613; Anon., 2 Chitty, 187.

(*c*) Doe d. Paul *v.* Hurst, 1 Chit. 162; Doe d. St. Margaret Westminster *v.* Roe, 1 Moore, 113; *et vide* Hazlewood d. Price *v.* Thatcher, 3 T. R. 351.

(*d*) Doe d. Pamphilon *v.* Roe, 1 Dow. P. C. 186.

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[1] In the case of Jackson ex dem. Salisbury v. Salisbury, (3 Wen. Rep. 430,) the declaration was served by delivering it to the wife of the defendant, on the premises claimed. The service not being on the defendant personally, leave was asked, pursuant to the Revised Statutes, (part 3, ch. 5, tit. 1, sec. 15, vol. 2, p. 305,) to enter a rule for the defendant to appear and plead, which was granted.

The section of the Revised Statutes, above cited, is in the following terms:

Sec. 15. "But, where the declaration shall have been served in any other manner than upon the defendant, personally, no rule to plead shall be entered, without the special order of the court."

If the service of the declaration in ejectment is not in the regular or ordinary manner, a judgment by default, for want of an appearance, should not be entered, until the court, on a rule to show cause, has sanctioned the mode of service. Den ex dem. Auten v. Fenn, The President, &c., of the Bridgewater Copper Mining Company, Tenants, 5 Halst. Rep. 247.

tenant's attorney and "a person believed to have been left in possession by the tenant," together with service at the tenant's last place of abode, leaving the declaration at the tenant's country house, when he had rendered the demised premises inaccessible, affixing the declaration on a conspicuous part of the premises, and upon the door of a barn in which the tenant had occasionally slept, where there was no dwelling-house, and the like have been held good services;(*a*)[1] but in all these cases it has been required that it should appear distinctly in the affida-

(*a*) Doe *v.* Roe, 1 D. & R. 514; Doe d. Scott *v.* Roe, 6 Bing. N. C., 207; Anon., 2 Chitty, 179; Doe d. Hill *v.* Roe, 2 Chitty, 178; Fenn d. Buckle *v.* Roe, 1 N. R. 293; Barrow *v.* Roe, 1 Man. & G. 238; Sprightley d. Collins *v.* Durch, Burr. 1116.

Service of declaration in ejectment, by leaving it with the daughter of the tenant in possession, (who was confined by indisposition,) with an affidavit that the daughter acknowledged the receipt of the declaration, and that she had read it over and explained it to her mother before the essoign day of the term, sufficient for a rule *nisi* for judgment against the casual ejector. Doe v. Roe, 3 Dowl. & Ryl. Rep. 12.

Service of the declaration in ejectment upon the wife of the tenant in possession, without stating that it was served at the husband's house, or on the premises, insufficient to support a rule for judgment against the casual ejector. Right ex dem. Bomsall v. Wrong, 2 Dowl. & Ryl. Rep. 84.

Where a declaration in ejectment was left at the house of the tenant, on Saturday, and the tenant afterwards acknowledged that he received it on the following Sunday, (which was before the essoign day:) held, that this was not good service. Doe v. Roe, 5 Barn. & Cress. Rep. 764.

Service of the declaration in ejectment upon the servant, on a Saturday, with an acknowledgment by tenant, on a Sunday, insufficient for a judgment against the casual ejector. Goodtitle ex dem. Mortimer v. Notitle, 2 Dowl. & Ryl. Rep. 232.

Service of the declaration in ejectment must be before the essoign day of the term; but, where the service was before that day, and the explanation of it to the tenant in possession did not take place till after: held, that the lessor of the plaintiff was not entitled to judgment. Doe v. Roe, 1 Dowl. & Ryl. Rep. 563.

An affidavit of service of a copy of the declaration and notice, in ejectment, on the son of the tenant in possession, and that the tenant acknowledged that he had received the same, is not sufficient; as it must state that such acknowledgment was made before the essoign day. Doe ex dem. M'Dougal v. Roe, 4 Moore's Rep. 20.

An affidavit, stating that the declaration was served on the daughter of the tenant, must also show that the service was made on the premises in question. Den v. Fen, 7 Halst. 321.

[1] Where the tenant of a house locked it up and quitted it, and the landlord, three months afterwards, fixed a copy of a declaration in ejectment to the door: held, that the service was not sufficient, but that the landlord should have treated it as a vacant possession. Doe ex dem. Ld. Darlington v. Cook, 4 Barn. & Cress. Rep. 259.

A notice at the bottom of a declaration in ejectment, affixed to the door of an empty house, addressed to the personal representatives of the deceased tenant, generally, was held insufficient; as, if there had been represenatives, who had taken possession, they should have been addressed by name; if not, the lessor of the plaintiffs should have proceeded as

vits of service, that the tenant had absconded or kept out of the way to avoid service, *that his residence was unknown, and that reasonable diligence, showing the nature thereof, had been used to effect the service in the ordinary manner.(*a*)

It has, however, in one case been held that an affidavit that the tenant was abroad, and that it was uncertain when he would return, accompanied by service on the premises on the tenant's servant, was of itself sufficient for a rule *nisi*.(*b*)

Where premises were charged with an annuity, with a right of re-entry for arrears, and the tenant in possession was resident abroad for the purpose of avoiding his creditors, the Court of Common Pleas considered that service of the declaration on the premises, and affixing a copy upon the outer door of the house, was insufficient; and refused also to permit service on the solicitor of the tenant to be deemed good service, unless the residence abroad was for the express purpose of avoiding service in the particular action ;(*c*) and in a case in the King's Bench, in which it was sworn that the party went abroad to avoid the service of the declaration, the affixing of a copy of the declaration was required, as well as service upon a servant of the tenant on the premises.(*d*)

[*236] *With respect to service upon the wife of the tenant in possession, the decisions are certainly in some respects contradictory; but the rule to be collected from the majority of them is, that the service will be held sufficient if the court is satisfied that the parties

(*a*) Anon., 1 Chit. 505; 2 Chit. 177; Doe d. Batson *v.* Roe, 2 Chit. 176; Doe d. Lowe *v.* Roe, 1 Chit. 505; Doe d. Tarply *v.* Roe, 1 Chit. 506.

(*b*) Doe d. Mather *v.* Roe, 5 Dow. P. C. 552.

(*c*) Roe d. Fenwick *v.* Doe, 3 Moore, 576; Doe d. Bracebridge *v.* Roe, 7 Scott, 689.

(*d*) Doe d. Jones *v.* Roe, 1 Chit. 213; Doe d. Lowe *v.* Roe, 2 Chit. 177; Doe d. Hele *v.* Roe, 2 Chit. 178.

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in the case of a vacant possession. Doe ex dem. The Governor of the Hospital of Saint Margaret, Westminster v. Roe, 1 Moore's Rep. 113.

In an action by a landlord against a tenant, for the non-payment of rent, where the premises are unoccupied, and there is no dwelling-house or other building on the premises, the affixing the declaration on a post in a conspicuous place on the premises, will be deemed a good service, and a rule to plead will be allowed to be entered. Evans v. Moran, 12 Wen. 180.

Whether such service would be deemed good where the relation of landlord and tenant does not exist? Ib.

are man and wife, or have represented themselves and are believed so to be, and that they are residing *together at the time of the service.(*a*)[1] Where the service on the wife is effected upon the demised premises,(*b*) or it would seem at the residence or place of business of the husband, if it be near to them,(*c*) the court will assume that they are living together, otherwise that fact must be stated in the affidavit of service; and this rule applies although the service be effected at the dwelling-house of the parties, if it be not on or near the demised premises.(*d*)

The mere acknowledgment of the wife, that she has received a declaration, and given it to her husband, if it be not personally served upon the wife, will not be good service;(*e*) nor will the court allow a declaration of the wife respecting her husband's absence, &c., to be made use of against him for the purposes of the rule;(*g*) nor will a declaration, where the service has not been personally on her, that she will see her husband and tell him what to do, or anything of a like nature, avail.(*h*) But where the wife ran in and closed the door so that the deponent could not leave the notice with her, but he read and explained the same aloud, and affixed a copy on the door, the court granted a rule *nisi*, upon the ground, it should seem, that this was in the nature of a personal obstruction to the due service of the notice.(*i*)

†Service upon the wife of one of two joint tenants will not bind the co-tenant.(*k*) [2]

(*a*) Doe d. Walker *v.* Roe, 4 M. & P. 11; Doe d. Brenner *v.* Roe, 8 Dow. P. C. 135; Doe d. Simmons *v.* Roe, 1 Chitty, 228; Doe d. Grange *v.* Roe, 1 Dow. N. S. 274.

(*b*) Goodtitle *v.* Badtitle, 4 Taunt. 820.

(*c*) Doe *v.* Roe, 1 Dow. P. C. 67; Doe d. Bath, Marquis of, *v.* Roe, 7 Dow. P. C. 692.

(*d*) Goodright d. Waddington *v.* Thrustout, 2 W. Black. 800; Doe d. Wingfield *v.* Roe, 1 Dow. P. C. 693; Right d. Bomsall *v.* Wrong, 2 D. & R. 84; Doe d. Graff *v.* Roe, 4 Dow. P. C. 456; Doe d. Williams *v.* Roe. 2 Dow. P. C. 89; Doe d. Mingay *v.* Roe, 6 Dow. P. C. 182; Doe d. Boulcott *v.* Roe, 7 Dow. P. C. 463.

(*e*) Goodtitle d. Read *v.* Badtitle, 1 B. & P. 384; Doe d. Tucker *v.* Roe, 2 Dow. P. C. 775.

(*g*) Doe d. Wilson *v.* Smith, 3 Dow. P. C. 379.

(*h*) Doe d. Briggs *v.* Roe, 1 Dow. P. C. 312.

(*i*) Doe d. Nash *v.* Roe, 8 Dow. P. C. 305.

(*k*) Wood. L. & T. 463.

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[1] Jackson *v.* Salisbury, 3 Wendell, 430.

[2] The return of the marshal, of service of the declaration in ejectment, stating that he had served it on H. and C., on the premises, by showing it to H., and delivering a copy at the dwelling-house of H. & C. on the premises, said C. being absent, and the copy left in the presence of his wife, is defective, in not stating that a copy of the declaration was delivered

When the service is on a member of the family, the rule is, that it must appear, from the affidavit, of service that the declaration was delivered to the party served before the first day of the term, and that the tenant has subsequently acknowledged that he received the declaration or knew of its contents before such first day; that is to say, in other words, that the tenant was himself served, through the medium of the member of his family, in due time.(*a*) In accordance with the principle of this rule, if the acknowledgment of the tenant should be that he received the declaration on a Sunday, it will not be sufficient, because service upon him on that day by the lessor himself would be void.(*b*)

There are only two reported cases in which the courts have so far deviated from this wholesome and intelligible rule as to grant rules absolute in the first instance, where the service has been upon a member of the family and not acknowledged by the tenant to have been received by him before the first day of term. In one of these cases the tenant was ill, and the daughter took the declaration up stairs, and when she returned said she had read and explained it to her father ;(*c*) in the other, the tenant afterwards came to the attorney of the lessor of the plaintiff, and said he knew the time was coming when "something must be done."(*d*) But there are several cases in which, from circumstances, the courts have been induced to grant rules *nisi*, and the principle seems to be that such *rules will be granted when the court has reasonable grounds for inference that the declaration did reach the tenant's hands before the first day of term, although there is no direct proof of the fact.

The following illustrations of this principle will be found in reported cases. Where the service was on the son, who said his father was ill

(*a*) Roe d. Hambrook *v.* Doe, 14 East, 441; Doe d. Macdougall *v.* Roe, 4 B. Moore, 20; Doe d. Halsey *v.* Roe, 1 Chitty, 160; Doe d. Tindall *v.* Roe, 2 Chitty, 180; Right d. Freeman *v.* Roe, 2 Chitty, 180; Doe *v.* Roe, 5 B. & C. 764; Doe d. Durant *v.* Roe, 8 Scott, 459.

(*b*) Doe *v.* Roe, 5 B. & C. 764; Doe d. Warren *v.* Roe, 8 D. & R. 342.

(*c*) Doe d. Cockburn *v.* Roe, 1 Dow. P. C. 692.

(*d*) Doe d. Agar *v.* Roe, 6 Dow. P. C. 624.

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to H. and another to the wife of C., and that the notice was read and explained to them. It should also have stated, that H. and C. were tenants in common. Lessee of Campbell *v.* Harper et al., 3 Wash. Circ. Ct. Rep. 356.

If both tenants inhabit one house, and this appears by the return, it is sufficient to deliver one copy. Ib.

and unable to attend to business, accompanied by an admission of the wife that her husband had received the declaration.(*a*) Where the party, having served the son, met the tenant and told him what he had done, and the tenant said, "then there is no time to lose."(*b*) Where the son said, "my father came home the same night, and I gave him the declaration."(*c*) Where, after service upon the son, a summons for particulars was taken out by the tenant's attorney.(*d*) Where a daughter-in-law said, "she had delivered the declaration to her father-in-law, who said he would instruct an attorney."(*e*) Where the service was on the daughter, and the wife acknowledged, before the first day of term, that the declaration had come to her husband's hands.(*g*) Where the tenant was bed-ridden, and the service was on the daughter on the premises.(*h*) Where the service was on the son on the premises, and it clearly appeared that the tenant was keeping out of the way to avoid service.(*i*) Where the tenant was in America, and the son managed his business.(*k*) Where the tenant was at home and refused to be seen.(*l*) Where the service was on a servant, and the tenant's attorney *acknowledged that the declaration had been received.(*m*) Where the tenant refused to make any acknowledgment, but referred to his attorney, who also refused to make any.(*n*) Where the servant was desired to deliver the declaration to his master, and he stated that he had done so,(*o*) and the like. And in all cases of this character, if cause be shown against the rule, the court will require the affidavits to state affirmatively, that the tenant did not receive the declaration before the first day of term.(*p*)

Notwithstanding the above decisions, in the great majority of which the affidavits in support of the rules contain no affirmative statement

(*a*) Anon., Chitty, 182; Doe d. Messier *v.* Roe, 5 Dow. P. C. 716.
(*b*) Doe d. Brickfield *v.* Roe, 1 Dow. N. S. 270.
(*c*) Doe d. Timmins *v.* Roe, 6 Dow. P. C. 765.
(*d*) Doe d. Evans *v.* Roe, 2 Dow. N. S. 334.
(*e*) Doe d. Sykes *v.* Roe, 7 Scott, 121.
(*g*) Doe d. Morgan *v.* Roe, 1 Dow. N. S. 543; Doe d. Chaffey *v.* Roe, 9 Dow. P. C. 100.
(*h*) Doe d. Frost *v.* Roe, 8 Dow. P. C. 301.
(*i*) Doe d. Luff *v.* Roe, 3 Dow. P. C. 575.
(*k*) Doe d. Potter *v.* Roe, 2 Scott, 378.
(*l*) Doe d. Moody *v.* Roe, 8 Dow. P. C. 306.
(*m*) Doe d. Teverell *v.* Snee, 2 D. & R. 5.
(*n*) Doe d. Elderton *v.* Roe, 1 Dow. N. S. 585.
(*o*) Doe d. Jones *v.* Roe, 1 M. & Scott, 597.
(*p*) Doe d. Protheroe *v.* Roe, 4 Dow. 385.

either by the acknowledgment of the tenant or otherwise, that the declaration reached his hands before the first day of term, it is very doubtful upon the reported cases whether a mere acknowledgment by the tenant *himself* that he has received the declaration, unaccompanied by an admission that such receipt was before the first day of term, (although such acknowledgment should be made on the first day of term,) is a sufficient foundation even for a rule to show cause. The decisions nearly balance in point of number, but the good sense seems to be with the minority, which hold that if the service be upon a member of the family in due time, and the tenant acknowledge that it has reached his hands, it is sufficient to justify the court in calling upon him to show affirmatively the time when he did receive it.(*a*) It is singular *that in this conflict of cases it should have been ruled, that an acknowledgment by a member of the family, that she has given the declaration to the tenant, unaccompanied by a statement of the time when she so gave it, is sufficient to call upon the tenant to state affirmatively the time of its receipt, whatever doubts may exist as to the effect of such an acknowledgment by the tenant himself.(*b*)

When due service is prevented by fraud or violence, the courts will generally grant rules absolute in the first instance, and at all times rules to show cause; but, in addition to a statement of the particular facts of fraud or violence, it is always required that the affidavit should state affirmatively that the declaration was affixed to, or left upon the demised premises. Affidavits containing such statements, and stating also facts similar in character to the following, namely, that in deponent's belief the tenant was at home, but was denied for the purpose of avoiding service;(*c*) that the door of the house was locked, but that deponent saw the niece through the window, and it appeared by conversations, that the declaration was afterwards brought to the plaintiff's attorney;(*d*) that the tenant, or it seems his wife,(*e*) had refused

(*a*) Sufficient—Doe d. Smith *v.* Roe, 4 Dow. P. C. 265; Doe d. Figgins *v.* Roe, 2 M. & G. 294; Doe d. Gibbard *v.* Roe, 3 M. & G. 87; Doe d. Notting *v.* Roe, W. W. & D. 69. Insufficient—Doe d. Emsley *v.* Roe, 1 M. & G. 87; Doe d. Finch *v.* Roe, 5 Dow. P. C. 225; Doe d. Marshall *v.* Roe, 2 Ad. & Ell. 588; Doe d. Tindale *v.* Roe, 2 Chitty, 180; Doe d. Macdougall *v.* Roe, 4 Moore, 20; Doe *v.* Roe, 1 D. & R. 563; Roe d. Hambrook *v.* Doe, 14 East, 441; Doe d. Martin *v.* Roe, 1 Har. & W. 46: Anon., 2 Chitty, 87.

(*b*) Doe d. Threader *v.* Roe, 1 Dow. N. S. 261.

(*c*) Doe d. Turneroft *v.* Roe, 1 Har. & W. 371.

(*d*) Doe d. Mortlake *v.* Roe, 2 Dow. P. C. 444.

(*e*) Doe d. Courthorpe *v.* Roe, 2 Dow. P. C. 441.

to receive the declaration, whereupon deponent left it on a chair, explaining the nature and object of the service;(*a*) that the declaration and notice were passed under the door, the party refusing to open it, or listen to any explanation of its nature and object;(*b*) that the son was duly served on the premises, and stated that his father was gone out and would not return until midnight, accompanied by a statement on the next day from the wife, that the husband had returned but was again gone out, she did not *know where,(*c*) and the like,(*d*) have been held sufficient for rules absolute, or rules to show cause, according to the disposition of the presiding judge.

When the premises are totally deserted, and there is no one upon whom service can be effected, the claimant must resort to the ancient practice, unless the case falls within the provisions of stat. 11 Geo. 2, c. 19, s. 16, and 57 Geo. 3, c. 52, when he must proceed as on a vacant possession.(*e*)

But cases are not wanting in which this rule has been departed from. Thus, where one part of the premises was vacant, and the residue in the occupation of tenants, service on the tenants, and affixing a declaration on the door of the unoccupied part has been held sufficient.(*g*) And where a house had been kept locked up for four months, and no one had been seen to enter or come out of it, and it was impossible to see whether any goods were left on the premises,(*h*) and where in an ejectment by a mortgagee, it was not clear that the premises were legally vacant, and the mortgagor was purposely keeping out of the way,(*i*) affixing declarations on the doors of the premises have been held sufficient for rules *nisi*. In like manner a rule *nisi* was granted where the tenant and his family had embarked for America, and the service was by affixing a declaration to the door of the premises, and

(*a*) Doe d. Visger *v.* Roe, 2 Dow. P. C. 449.

(*b*) Doe d. Lowndes *v.* Roe, 7 Mee. & W. 439; Doe d. Lord Summers *v.* Roe, 5 Dow. P. C. 552.

(*c*) Doe d. Wetherell *v.* Roe, 2 Dow. P. C. 441.

(*d*) Doe d. Croley *v.* Roe, 2 Dow. N. S. 345.

(*e*) Doe d. Norman *v.* Roe, 2 Dow. P. C. 399, 428; Doe *v.* Roe, 4 Dow. P. C. 173; Doe d. Darlington, (Lord) *v.* Cock, 4 B. & C. 259; Doe d. Burrows *v.* Roe, 7 Dow. P. C. 326; Doe d. Showell *v.* Roe, 3 Dow. P. C. 691; Doe d. Seabrook *v.* Roe, 4 Moore, 350.

(*g*) Doe d. Evans *v.* Moore, 4 Moore, 469; Doe d. Handle *v.* Roe, 3 M. & W. 279; Doe d. Timothy *v.* Roe, 8 Scott, 126.

(*h*) Doe d. Law *v.* Roe, W. W. & D. 187.

(*i*) Doe d. Smith *v.* Roe, W. W. & D. 69.

reading over and explaining the same on the premises to the servant of a tenant of another part of the premises.(*a*)

[*242] *Where the declaration was tendered on the day before the first day of term, but the defendant's servant said, he had orders not to receive any such thing, whereupon it was not then served, but was left at the house upon the day following, the court refused the rule, saying, "We sometimes make that service, under particular circumstances, good, which otherwise would have been imperfect; but here there was no service on the proper day, and we cannot antedate the service."(*b*)

When the service is good for part, and bad for part, the lessor may recover those premises for which the service is good; but if he proceed for all, and obtain possession by means of a judgment against the casual ejector, the court will compel him to make restitution of that part, for which the service was bad.(*c*)

When a rule *nisi* for judgment against the casual ejector is served on persons who appear and show they are not in possession, and have no claim on the premises, they are entitled to the costs of being brought before the court.(*d*)

OF THE AFFIDAVIT OF SERVICE.(*e*)[1]

[*243] When the service of the declaration has been effected, the next step to be taken, in order to obtain *judgment against

(*a*) Doe d. Osbaldiston *v.* Roe, 1 Dow. P. D. 456.
(*b*) Wood. L. & T. 466.
(*c*) Ibid. 463; Appendix, No. 41.
(*d*) Doe d. Tonsley *v.* Roe, 1 M. & G. 490.
(*e*) Appendix, Nos. 16, 17, 18.

[1] Affidavit of service is necessary only where it is not done by an officer of the court. Lessee of Campbell v. Harper et al., 3 Wash. Circ. Ct. Rep. 456.

Under the Act of the 13th of April, 1808, section 2, [Pennsylvania,] the sheriff's return of, "served in ejectment," is *prima facie* evidence, that the person on whom such service is made, is in possession, whether he be or be not the party named in the writ. Gratz et al. v. Benner, 13 Serg. & R. Rep. 110.

In ejectment, the affidavit to be sufficient must allege that the persons were tenants in possession, and that they were served with copies of the declaration and notice. Wharton v. Clay, 4 Bibb's Rep. 167.

Whether the tenant in ejectment is in possession is not a question upon the merits, but

the casual ejector, is to make an affidavit of such service; which affidavit is annexed to the declaration, and is the ground upon which the rule for judgment is to be moved for. In ordinary cases this motion is *of course*, that is to say, such only as requires counsel's signature; and the motion will not be received in court unless there is something special in the service,(*a*) but when any special circumstances exist, the rule *must be moved for as in other cases; and the motion may then be made, either before, or after the service of the declaration; although, if the lessor be aware of the obstacles he will have to encounter, it is better to move, prior to the service, for a rule to show cause why a service of such a nature as shall be stated in the affidavit should not be sufficient.(*b*)

The affidavit may be sworn before a judge, or a commissioner, and should be regularly made by the person who served the declaration; although the court have been satisfied with the affidavit of a person,

(*a*) Doe d. Welchon *v.* Roe, 5 Dow. P. C. 271.
(*b*) Method *v.* Noright, Blk. 290; Gulliver *v.* Wagstaff, Blk. 317.

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merely of irregularity, and affidavits may be heard upon it on both sides. Jackson ex dem. Beaver v. Stiles, 1 Cow. Rep. 222.

It must appear, by affidavit, that the declaration and notice were served upon the tenant in possession, before default can be taken against the casual ejector. Ib.

Acknowledgment by indorsement, of service of the declaration, must be proved. Freeman v. Oldham's Lessee, 4 Monroe's Rep. 420.

An affidavit of the service of a declaration in ejectment, which states that the copy was "served upon A.B., said to be one of the directors of the within named company," is insufficient. Den ex dem. Auten v. Fen, The President, &c., of the Bridgewater Mining Company, Tenants, 5 Halst. Rep. 237; ib. 7 Halst, 321.

The notice subjoined to the declaration must be read, or its contents explained to the person to whom it is delivered, or such person must be informed of the intent and meaning of the service: and that it has been so done, should be stated in the affidavit. Ib.

In the affidavit on which to move for judgment against casual ejector, in the case of a vacant possession, where one copy of the declaration was sworn to have been fixed on the premises, and another served on the lessee, but not on the premises, it is necessary to state that such lessee was tenant in possession, at the time of the service. Doe ex dem. Seabrook v. Roe, 4 Moore's Rep. 350.

In ejectment, if one part of the premises be vacant, and the other in the occupation of a tenant, it is sufficient, for an affidavit to ground a motion for judgment against the casual ejector, to state that a copy of the declaration was served on the tenant who occupied the one part, and that another copy was affixed to the door of that part which was vacant. Ib.

The affidavit of service of the declaration, in Mississippi, is unnecessary. Williams v. Oppelt, 1 Smedes & Marsh. Rep. 559.

who saw the declaration served upon, and heard it explained to the tenant in possession.(*a*)

[*244] The affidavit should be entitled in the name of the casual ejector, and not of the real defendant;(*b*) *and where there are several demises, it will be wrongly entitled if entitled "on the demise" of one only, without mentioning the others,(*c*) or if entitled "on the demise or demises of A. and B.;"(*d*) but an affidavit entitled "on the *several* demises of A., B., C., and D.," where some of the demises were *joint* demises, has been held sufficient.(*e*) And where the lessors are personal representatives, their character need not be noticed in the title of the affidavit.(*g*)

The affidavit must state in addition to the facts incident to the service, which have been already fully commented upon in the preceding pages, that the notice annexed to the declaration, (unless the tenant should happen to be an attorney,)(*h*) was read and explained at the time of the *service, or generally that the tenant was informed of its intent and meaning,(*i*) or satisfactory reasons given why such reading and explanation did not take place.(*k*)

If the affidavit only state that the notice was *read*, the service will not be sufficient;(*l*) and where it was said, on the delivery of the declaration, "*This is an ejectment from Mrs. C. D.*;"(*m*) as also where the expression was, "*This is an ejectment from Mrs. C. D., but it is not intended to turn you out of possession, but to get into the receipt of the rents and profits*;"(*m*) the services were held not to be good;(*m*) and an insufficient service of this kind will not be aided by an explanation, after the first day of term, of its nature and meaning.(*m*) But if the tenant acknowledge that he understands the meaning and intention of the service, it

(*a*) Goodtitle d. Wanklen *v.* Badtitle, 2 B. & P. 120.
(*b*) Anon., 2 Chitty, 181.
(*c*) Doe d. Cousins *v.* Roe, 4 M. & W. 68.
(*d*) Doe d. Neville and another *v.* Lloyd, 2 Dow. N. S. 330.
(*e*) Doe d. Barles *v.* Roe, 5 Dow. P. C. 447.
(*g*) Doe d. Jenks *v.* Roe, 2 Dow. P. C. 55.
(*h*) Doe d. Duke of Portland *v.* Roe, 1 Dow. N. S. 183.
(*i*) Doe d. Scriven *v.* Roe, 1 W. W. & H. 584.
(*k*) Doe d. George *v.* Roe, 3 Dow. P. C. 541.
(*l*) Doe d. Whitfield *v.* Roe, K. B. T. T. 1815, MS.; Doe d. Wade *v.* Roe, 6 Dow. P. C. 51.
(*m*) Doe d. Edwards *v.* Roe, K. B. H. T. 1821, MS.

will be good, without any such reading or explanation.(*a*) And an affidavit has been held sufficient which merely stated that the tenant appeared to be acquainted with the intent of the declaration, without stating that it had been either read or explained to him.(*b*)

In a case where it was alleged in the affidavit of service that the declaration "was *read over* to the tenant," without alleging also that it was explained, Patteson, J., is reported to have said, "That will do; it has also been held, that explanation without reading over will suffice. Rule granted;" and in another case upon an allegation precisely similar, Tindal, C. J., is reported to have said, "We had better not get into a new *form of affidavit. These proceedings are very unintelligible to common people. Rule refused."(*c*)

The affidavit must be positive that the person *served was [*245] the tenant in possession,(*d*) or that he acknowledged himself to be so.(*e*) It will not be sufficient to swear inferentially, as for example, that deponent "served the tenant in possession by serving *A. B.*,"(*g*) or to disclose facts from which a legal inference may be drawn that the party served is the tenant in possession;(*h*) nor to qualify the possession of the party served by stating that the service was upon him as executor or the like.(*i*)

An affidavit that deponent did serve *A. B.*, tenant in possession, *or his wife*, is not sufficiently certain as to either.(*k*) So also affidavits, that the deponent did serve the wives of *A.* and *B.* who, or one of them, are tenants in possession,(*l*) that he served the *person* in possession,(*m*) that he served *the occupier*,(*n*) and that he served *A. B.*, whom

(*a*) Doe d. Quintin *v.* Roe, K. B. T. T. 1816, MS.; Doe d. Stone *v.* Roe, 3 Hodges, 14; Doe d. Jones *v.* Roe, 1 Dow. P. C. 518.
(*b*) Doe d. Downes *v.* Roe, 4 Dow. P. C. 565.
(*c*) Doe *v.* Roe, 1 Dow. P. C. 428; Doe d. Wade *v.* Roe, 6 Dow. P. C. 51.
(*d*) Doe *v.* Roe, 1 Chitty, 574.
(*e*) Anon., 1 Barnard. 330; Goodtitle *v.* Davis, 1 Barnard. 429.
(*g*) Doe d. Dalby *v.* Hitchcock, 2 Dow. N. S. 1.
(*h*) Doe d. Jones *v.* Roe, 5 Dow. P. C. 226.
(*i*) Doe *v.* Roe, 2 Tyr. 158.
(*k*) Birbeck *v.* Hughes, Barn. 173.
(*l*) Harding d. Baker *v.* Greensmith, Barn. 174.
(*m*) Doe d. Robinson *v.* Roe, 1 Chitty, 118; Doe d. Fraser *v.* Roe, 5 Dow. P. C. 720.
(*n*) Doe d. Jackson *v.* Roe; 4 Dow. P. C. 609.

he verily believed to be the tenant in possession,(*a*) have been held insufficient.

When the party served as tenant in possession appears to the action, the court will not set aside his appearance, on a suggestion by the lessor of the plaintiff that he has no interest in the premises.(*b*)

*If several persons be in possession of the disputed premises, and separate declarations in ejectment be served upon them, one affidavit of the service upon all, annexed to the copy of one declaration, is sufficient, provided one action of ejectment only be intended;(*c*) but if the ejectments are made several, so as to have separate judgments, writs of possession, &c., then separate affidavits, of the several services upon the different tenants, must be annexed to copies of the several declarations respectively.(*d*)

When one action only is intended, the names of *all* the tenants are generally prefixed to each notice; but where the name of the individual tenant alone, upon whom each particular declaration [*246] was served, was prefixed to the *notice to such declaration, so that it could not be sworn that a copy of any *one* declaration and notice had been served on *all* the tenants, the court, notwithstanding, thought one rule sufficient;(*e*) but where, in a case in other respects similar, no name whatever was introduced in the notice appended to the copy of the declaration annexed to the affidavit of service, the court refused the rule.(*g*)

An affidavit stating the deponent had *personally* served *A.*, *B.*, *C.*, and *D.*, the *four* tenants in possession, with true copies of the declaration, &c.," has been held insufficient, because it was not sworn specifically that *each* tenant had been *personally* served. The only mode of rendering this decision intelligible is, by assuming that the word *personally* in the affidavit must have been taken to refer to the *deponent*, and not to the *tenants*.(*h*)

(*a*) Doe *v.* Badtitle, 1 Chitty, 215; Doe d. George *v.* Roe, 3 Dow. P. C. 612.
(*b*) Doe d. Turner *v.* Gee, 9 Dow. P. C. 612.
(*c*) Appendix, No. 17.
(*d*) 2 Sell. Prac. 100.
(*e*) Roe d. Burlton *v.* Roe, 7 T. R. 477.
(*g*) Doe d. Ludford *v.* Roe, 8 Dow. P. C. 500.
(*h*) Doe d. Levi *v.* Roe, 7 Dow. P. C. 102,

*When an affidavit of service is defective, the court will not grant a rule upon an undertaking that a supplemental affidavit shall be made remedying the defect; but upon obtaining such supplemental affidavit, the rule may be moved for as in ordinary cases.(*a*)

Where the proceedings are under stat. 4 Geo. II., c. 28, the affidavit must be positive that there is no sufficient distress upon the premises, the deponent's "belief" will not be sufficient.(*b*)

When the action is founded on stat. 1 Geo. IV., c. 87, s. 1, instead of moving for judgment in the ordinary way, the lessor should be prepared with the affidavits required by that statute, in addition to the usual affidavit of service; and the motion should be for a rule to show cause "why the party should not undertake, upon being admitted defendant, besides entering into the common rule, and giving the common undertaking, to give the plaintiff judgment, in case he obtain a verdict of the term next preceding the trial; and why he should not enter into a recognizance by himself and two sufficient sureties, in a sum to be named by the court, to pay the costs and damages which may be recovered in the action."

*When the claimant proceeds upon the stat. 1 Wm. IV., c. [*247] 70, s. 30, it must be sworn, in addition to the usual affidavit of service, that the relation of landlord and tenant subsisted between the lessor and the party in possession, and that the interest of the latter expired within ten days next before the service of the declaration.

When the affidavit was sworn on June 8, 1840, and †stated the service to have been made "on May 26," without saying "last," or mentioning any year, it was considered insufficient.(*c*)

OF JUDGMENT AGAINST THE CASUAL EJECTOR.[1]

The declaration having been duly served and the affidavit of service prepared, the next step to be taken in the cause by the lessor of the

(*a*) Jenny d. Preston *v.* Cutts, 1 N. R. 308; Goodtitle d. Sandys *v.* Badtitle, K. B. T. T. 1819, MS.

(*b*) Doe *v.* Roe, 2 Dow. P. C. 413.

(*c*) Doe d. Foster *v.* Roe, 8 Dow. P. C. 784.

[1] A default for the tenants not appearing, must be entered before judgment by default

plaintiff is to move for judgment against the casual ejector; that is to say, that the plaintiff shall be at liberty to sign judgment by default unless the party interested shall appear to the action and plead to issue within the time limited in the rule.(*a*) These motions, unless there be something special in the service of the declaration, are motions of course, requiring only the signature of counsel, and will not be received in court, but must be taken at once to the proper officer to draw up the rule. If, however, any special circumstances do exist, the rule must be moved for as in other cases.

Much diversity and some perplexity formerly prevailed, with respect to the practice of the different courts as to the time of moving for these judgments, and also as to the time for the appearance of the parties interested, but the practice is now much simplified and uniform in all of them.

With respect to the time of moving for judgment against the casual ejector, the motion ought regularly to be made during the term in which the tenant is directed to appear by the notice at the foot
[*248] of the declaration; *but the motion may, notwithstanding, be made at any time during the term next following such term,(*b*)

(*a*) Appendix, Nos. 20, 21, 22.

(*b*) Doe *v.* Roe, 2 Tyr. 724; 2 Dow. P. C. 196; Doe d. Barth *v.* Roe, 4 Bing. N. C. 675; Doe d. Walker *v.* Roe, 9 M. & W. 426; Doe d. Wilson *v.* Roe, 4 Dow. P. C. 124; Doe d. Fell *v.* Roe, 1 Dow. N. S. 777.

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can be entered against the casual ejector. Jackson ex dem. Vrooman v. Smith, 1 Johns. Rep. 106.

A default for want of a plea, must be entered against the casual ejector, and not against the tenant. Jackson ex dem. Van Alen v. Vischer, 2 Johns. Cas. 106; S. C., Coleman's Cas. 116; Jackson ex dem. Quackenboss v. Woodward, 2 Johns. Cas. 110; S. C., Coleman's Cas. 120.

In ejectment at common law, judgment for want of an appearance must be against the casual ejector. Gardinier v. Lessee of Murray et ux., 4 Yeates's Rep. 560. (In error.)

Judgment signed against the casual ejector, where the service was upon the wife of a tenant in possession, who had left the kingdom, and was settled in a foreign country. Doe v. Roe, 1 Dowl. & Ryl. Rep. 514.

It is regular to take a rule upon the tenant in possession, to appear on some day, during the court to which the declaration is returned, and to sign judgment, if such appearance is not entered within the terms prescribed; reserving, however, to the tenant, the right to have the judgment vacated, if an appearance be entered afterwards and during the same term, if the session should continue beyond the period stated in the rule. Lessee of Campbell v. Harper et al., 3 Wash. Circ. Ct. Rep. 356.

(but not afterwards,) (*a*) though it is *somewhat doubtful, upon the authorities, whether, if the motion be so delayed, the courts will grant a rule absolute in the first instance.(*b*) With respect to the time of appearance, the rules are as follows:—

In town causes, that is to say, when the premises are situated in London or Middlesex, if the notice be to appear within the first four days of term, and the rule be moved for before the last four days, the tenant must appear within four days after the time of moving; but if the motion be not made until within the last four days of term, then the tenant need not appear until two days before the next term.

If in town causes the notice be to appear of the term generally, and the rule for judgment be moved for early in the term, the tenant has until the last day of such term to appear; but if the motion be not made until within the last four days of term, the practice as to the time of appearance is the same as if the notice had been to appear on the first day of term.

*In country causes, that is to say, when the premises are [*249] situated elsewhere than in London or Middlesex, the tenant must always appear within four days after the term in which the rule for judgment is obtained, whether the notice be to appear of that term generally, or within the first four days thereof, or of the term next before the term in which the motion is made.

When the action is brought under the provisions of the stat. 1 Wm. IV. c. 70, s. 36, the tenant must, in all cases, enter his appearance within ten days after the delivery of the declaration.

†The rule for judgment against the casual ejector must, in all cases, be drawn up, and taken away from the office of the clerk of the rules, within two days after the end of the term in which the rule has been obtained, or no further proceedings can be had in the action.(*c*)

(*a*) Doe *v.* Roe, 1 Dow. P. C. 495.

(*b*) Right d. Jeffery *v.* Wrong, 2 Dow. P. C. 348; Doe d. Wilson *v.* Roe, 4 Dow. P. C. 124; Doe d. Wiggs *v.* Roe, 5 Dow. P. C. 662; Doe d. Croome *v.* Roe, 6 Dow. P. C. 270; Doe d. The Earl of Warwick *v.* Roe, 9 Dow. P. C. 714.

(*c*) Reg. Gen., M. Term, 31 Geo. 3.

By a late rule of court, the party entitled to appear has now the privilege of appearing and pleading to the action in town causes, at any time after the service of the declaration, and before the end of the fourth day of the term in which he is required by the notice to appear, and in country causes before the end of the fourth day after the term in which he is required to appear, although the plaintiff may not have obtained a rule for judgment against the casual ejector,(*a*) and may also proceed to compel the plaintiff to reply or sign judgment of *non pros.* And a plaintiff, who has omitted to obtain a rule for judgment within the prescribed time, is in return privileged on the production of such plea, to an order of a judge for leave to draw up a rule for judgment, as of the time at which such rule would have been regularly obtained.(*b*)

When the time appointed for appearance is expired, it is not necessary to give a rule to plead, or to enter an appearance for the defendant,(*c*) but judgment may be at once signed against the casual [*252] ejector,(*d*)[1] *but such judgment must not be signed until the day next after that on which the rule expires; and if Sunday happen to be the last day, not until Tuesday.(*e*) If also the lessor delays to sign judgment for upwards of a *year, the tenant will be entitled to a term's notice before judgment can be signed.(*g*)

When the action is against several tenants in possession, and the notice at the foot of the declaration is addressed to all of them, and each tenant is served with a copy addressed to all, there should be only one rule for judgment against the casual ejector.(*h*)

Judgments against the casual ejector irregularly obtained, will, as a

(*a*) This rule does not include, in terms, town causes in which the notice is to appear of the term generally; but it is probable that the courts would hold them to be within its equity, and allow the defendant to appear and plead within four days *after* the term, as in country causes.

(*b*) Reg. Gen., H. T. 4 Vic.; 1 Q. B. R. 1.

(*c*) Doe d. Morgan *v.* Roe, 2 M. & W. 423.

(*d*) Appendix, No. 23.

(*e*) Hyde d. Culliford *v.* Thrustout, Sayer, 303.

(*g*) Doe d. Vernon *v.* Roe, 7 Ad. & Ell. 14.

(*h*) Doe d. Vorley *v.* Roe, 2 Dow. N. S. 52.

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[1] The motion for judgment must be founded on an affidavit of the service of the writ, and must be at the term when the default is made. Truer v. Bowman, 3 Penn. Rep. 70.

matter of course, be set aside,[1] if the application be made at the proper time ;(*a*) and as the situations of claimant and defendant in ejectment

(*a*) Doe d. Parr *v.* Roe, 1 Q. B. R. 700.

[1] Inserting the word "judgment" in the entry of the tenant's default for not appearing, &c., in an action of ejectment, will not alter the legal effect of the entry; but it will, notwithstanding, be good; and the word "judgment" may be rejected as surplusage. Jackson ex dem. Sutherland et al. v. Stiles, 5 Cow. Rep. 418.

Following this, by a rule for judgment generally, without saying against whom: held, a good rule for judgment against the casual ejector. Ib.

Where the tenant swears to merits, and no trial has been lost, a regular default will be set aside, on payment of costs, to let in the tenant to defend his possession. Jackson ex dem. Mentz v. Stiles, 4 Johns. Rep. 489.

The court will go further to protect the possession, when it can be done without injury to the plaintiff's claim, than it is willing, in other cases, to proceed. Jackson ex dem. Rosekrans v. Stiles, 1 Caines' Rep. 503.

So, where the plea and consent rule miscarried through mistake, and never reached the plaintiff's attorney, judgment by default, and writ of possession, were set aside, and a writ of restitution ordered, on payment of costs. Ib.

A default was set aside, on an affidavit of merits, and that the tenants supposed that the supreme court was held at the circuit. Jackson ex dem. Norton v. Stiles, 3 Caines' Rep. 133.

A judgment by default, in ejectment against the casual ejector, for want for an appearance, will not be set aside because the declaration in ejectment was served by the lessor of the plaintiff. Den ex dem. Auten v. Fen, The President, &c., of the Bridgewater Copper Mining Company, Tenants, 5 Halst. Rep. 237.

Where there has been a judgment by default against the casual ejector, and a *habere facias possessionem* issued thereon, the court will, on affidavit of fraud or surprise, and of a real defence, and on payment of the costs on the judgment, set aside *habere* and order restitution. Den v. ———, 2 Halstead's Rep. 161, overruled Den v. Feren, 1 Halstead's Rep. 431; where the same court denied their power to set aside an *habere*, under similar circumstances.

In an action of ejectment, the plaintiff obtained judgment against the casual ejector, and possession by writ under that judgment. At the second term, thereafter, the landlord of one of the tenants in possession, moved the court to set aside the judgment, &c. A rule was granted for the plaintiff to show cause, &c. At the next term, the county court set aside the judgment, awarded restitution as prayed, permitted the landlord to appear, ordered the action to be reinstated on the docket, and regular continuances to be entered therein. At this stage of the proceedings, the plaintiff moved the court for a reconsideration, and to set aside the order for restitution, as unduly obtained.

This being refused, the plaintiff appealed: held, that the setting aside a judgment against a casual ejector, on the motion of the landlord of the tenant in possession, awarding restitution of the premises, and ordering the action to be tried, is but an interlocutory proceeding from which an appeal will not lie; and the refusal of the county court to reconsider such proceedings does not alter the case. Gover et al. Lessee v. Cooley, 1 Harr. & Gill's Rep. 7. See Den v. Applegate, 7 Halst. 321.

The fact that a sheriff, in executing a *habere facias*, delivered more land than the defendant held, does not justify an order of restitution for the whole. Breading's heirs v. Taylor, 6 Dana's Rep. 226.

are materially different, the courts are liberal in their rules for setting aside such judgments, although regularly signed, provided the application be made before execution. And they will also grant them in special cases after execution executed, as for example, if collusion appears to have existed between the lessor and the tenant,(*a*) or if the omission to appear arises from the inadvertence of the attorney;(*b*) but they are of course more stringent as to granting these rules after the possession is changed, than whilst the parties continue in the relative positions they occupied at the commencement of the proceedings.(*c*)

The regular mode of setting aside such judgments is by rule of court, for the party having obtained the judgment to give up the possession; but if the circumstances of the case require it, the courts will order a writ of restitution to be issued.(*d*)

When a party obtains possession under an irregular judgment, the order for the restoration of the possession to the defendant should be made upon the party in possession, and not upon the sheriff; and it would seem that a judge at Chambers has no power to order a writ of restitution.(*e*)

[*253] Where a party, having been permitted *to defend alone, as landlord, died before the trial of the cause, devising his real estates to *B.*, and the lessor (having committed no wilful delay,) was prevented by the Statute of Limitations from bringing a fresh ejectment, the court gave him leave to sign judgment against the casual ejector in the old suit, and issue execution thereon, unless *B.* would appear and defend as landlord.(*g*)

(*a*) Goodtitle *v.* Badtitle, 4 Taunt. 820; Doe d. Grocer's Company *v.* Roe, 5 Taunt. 205; Doe d. Thomson *v.* Roe, 4 Dow. P. C. 115; *vide contra*, Doe d. Troughton *v.* Roe, Burr. 1996; Dobbs *v.* Passer, Stran. 975; Mason d. Kendale *v.* Hodgson, Barn. 250.

(*b*) Doe d. Mullarkey *v.* Roe, 11 Ad. & Ell. 333; Doe d. Shaw *v.* Roe, 13 Price, 260.

(*c*) Doe d. Ledger *v.* Roe, 3 Taunt. 506.

(*d*) Goodright d. Russell *v.* Noright, Barn. 178; Davies d. Povey *v.* Doe, Blk. 892; Appendix, No. 41.

(*e*) Doe d. Williams *v.* Williams, 2 Ad. & Ell. 381.

(*g*) Doe d. Grubb *v.* Grubb, 5 B. & C. 457.

*CHAPTER VIII.

Of the Appearance—Plea—and Issue.

In the preceding chapter the proceedings on the part of the claimant have been considered, and the suit conducted to its termination, when no appearance is entered in pursuance of the notice subscribed to the declaration. We must now consider the proceedings on the part of the tenant in possession, and point out the persons who may appear and defend the action, in what manner such appearance should be made, and the other steps necessary to be taken to bring the question to trial.

Notwithstanding the power possessed by the courts of framing rules for the improvement of this remedy, the interference of the legislature has at times been called for, and it has been most beneficially exerted in regulating the appearances to the action. The tenant in possession, being the person *prima facie* interested, is, of course, the party on whom the declaration is always served; although it frequently happens in practice, that the lands belong to some third person out of possession, to whom such service can afford no information of the proceedings against him, and who by the common law has no remedy against his tenant if he omit to give him notice of them. By the rules *and practice of the courts also, for it would scarcely be cor- [*255] rect to say by the common law, the landlord, it seems, was not permitted to defend, even when he did receive notice, unless the tenant consented to become a co-defendant with him;(*a*) and no means existed by which †the tenant could be compelled to appear, and be made such co-defendant.(*b*) This system occasioned great inconvenience to landlords. The tenants, from negligence or fraud, frequently omitted to appear themselves, or to give to the landlords the necessary notice; and although judgments against the casual ejector have been set aside, upon affidavits of circumstances of this nature, the remedy was still very incomplete.(*c*)

(*a*) Lill. Pr. Reg. 674.
(*b*) Goodright *v.* Hart, Stran. 880.
(*c*) Anon., 12 Mod. 211.

To remedy these imperfections, the courts are authorized, by 11 Geo. II., c. 19, s. 13, to suffer the landlord to make himself defendant by joining with the tenants, in case they shall appear; but in case they shall refuse, or neglect to appear, and the landlord shall desire to appear by himself, the court shall permit such landlord so to do, judgment being first signed against the casual ejector, and order a stay of execution upon such judgment until they shall make further order therein.[1]

[*257] *By the 12th section of the same statute it is also enacted, "That every tenant, to whom any declaration in ejectment shall be delivered, shall forthwith give notice thereof to his landlord, bailiff, or receiver, under the penalty of forfeiting the value of three years' improved, or rack-rent of the demised premises, to be recovered by action of debt.[2]

[1] The Revised Statutes of New York, part 3, ch. 5, tit. 7, sec. 17, contain the following provision:

Sec. 17. "No imparlance, voucher, aid-prayer, or receipt, shall be allowed; but, whenever any action shall be brought against any tenant, to recover the land held by him, or the possession of such land, the landlord of such tenant, and any person having any privity of estate or interest with such tenant, or with such landlord, in the premises in question, or in any part thereof, may be made defendant with such tenant, in case he shall appear; or may, at his election, appear without such tenant. And, in the latter case, the court may order a stay of execution upon any judgment against the tenant in possession, until the further order of the court."

[2] The Revised Statutes of New York, part 2, ch. 1, tit. 4, sec. 21, contain the following similar enactment:

Sec. 27. "Every tenant, to whom a declaration in ejectment, or any other process, proceeding, or notice of any proceeding, to recover the land occupied by him, or the possession thereof, shall be served, shall forthwith give notice thereof to his landlord, under the penalty of forfeiting the value of three years' rent of the premises so occupied by him, which may be sued for and recovered by the landlord or person of whom such tenant holds."

Demise, by lease, of certain lands, together with the mines under them, with liberty to dig for ore in other mines under the surface of other lands not demised.

The tenant fraudulently concealed a declaration in ejectment delivered to him, and suffered judgment to go by default; the declaration in ejectment did not mention mines at all, but the sheriff, in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised by the tenant, and also of those mines in which he had only liberty to dig; held, that, although the latter could not be recovered under the declaration in ejectment, still, that the tenant, by his own act, had estopped himself from taking that objection, and that, in an action for the value of three years' improved rent, under the statute of 11 G. II., c. 19, the landlord might recover the treble rent, in respect not only of the demised premises, but of the mines in which the tenant had only liberty to dig.

The improved or rack-rent mentioned in the 11 G. II., ch. 19, sec. 12, is not the rent reserved, but such a rent as the landlord and tenant might fairly agree on, at the time of delivering the declaration in ejectment, in case the premises were then to be let. Crocker v. Fothergill, 2 Barn. & Ald. Rep. 652.

This latter section has been interpreted to extend only to those cases in which the ejectments are inconsistent with the landlord's title. Thus, a tenant of a mortgagor, who does not give him notice of an ejectment, brought by the mortgagee upon the forfeiture of the mortgage, is not within the penalties of the clause.(*a*)

The first enactment in the thirteenth section of this statute, namely, that landlords may be made defendants *by joining [*257] *with the tenants in possession, is decidedly only a legislative sanction of the previous uniform practice of the courts; and it is also said, by Wilmot, J., in the case of *Fairclaim d. Fowler* v. *Shamtitle*,(*b*) that landlords were permitted, before this statute, to defend ejectments without joining the tenants in possession. There is indeed but one case extant in which the contrary doctrine is maintained;(*c*) and the loose notes to be found of cases previous to that decision certainly favor Mr. J. Wilmot's opinion.(*d*) It is, therefore, probable that the practice was not clearly settled until the time of such decision, and that the statute was enacted in consequence of the inconvenience resulting from it.(*e*)

By the words of the statute the courts can admit *landlords* only to defend, and difficulties have frequently arisen, as to the meaning of the word *landlord* in the act, and as to what interest in the disputed premises will be sufficient to entitle a person claiming title, to appear and defend the action.[1]

(*a*) Buckley *v.* Buckley, 1 T. R. 647.
(*b*) Burr. 1301.
(*c*) Goodright *v.* Hart, Stran. 830.
(*d*) Lamb v. Archer, Comb. 208; Anon., 12 Mod. 211.
(*e*) Fairclaim d. Fowler *v.* Shamtitle, Burr. 1290, 1298.

[1] In ejectment, the defendant's name will not be struck out, in order to substitute the landlord's, without the plaintiff's consent, but the landlord may be made a co-defendant. Emlen v. Hoops, 3 Serg. & R. Rep. 130. See Beardsley v. Torrey, 4 Wash. C. C. Rep. 286.

A motion to admit a landlord to defend in ejectment, may be grounded on the affidavit of his agent showing the relation of landlord and tenant between him and the tenant in possession. Jackson ex dem. Sager et al. v. Stiles, 1 Cow. Rep. 134; Den v. Fen, Halst. Rep. 185.

Where a party defends an ejectment as landlord, and the occupiers of the premises have suffered judgment by default, he cannot object that the occupiers have not received notice to quit from the lessor of the plaintiff. Doe ex dem. Davies v. Creed, Davies & Cheese v. Creed, 5 Bingh. Rep. 327.

Where the lessor of the plaintiff proceeded as for a vacant possession, and obtained a re-

In the first reported case upon the construction of this section, it was holden, that it was not every person *claiming title*, who could be admit-

gular judgment by default, it was set aside and the person claiming to be owner of the land, on the affidavit of merits, &c., was admitted as defendant, on payment of costs, and stipulating to admit he was in possession at the commencement of the suit. Wood ex dem. Elmendorf v. Wood, 9 Johns. Rep. 257.

A party will not be admitted to defend on an affidavit that he claims title to the premises, and has a real and substantial defence to make. Jackson ex dem. Winter v. M'Evoy, 1 Caines' Rep. 151. See Wisner v. Wilcocks, Coleman's Cases, 56; Saltonstall v. White, Ib., 82; Styles v. Jackson, 1 Wend. 316.

A. leased a lot of land to B., and the lease contained a power of re-entry for the non-payment of the rent, &c.: B. leased the same premises to C., by parol. A. brought an action of ejectment for the recovery of the premises, under the 23d section of the act (sess. 11, ch. 36,) for non-payment of the rent, &c., and a judgment by default was entered on the 27th of September, 1811, against the casual ejector, and final judgment entered on 23d of December, 1811, and a writ of possession thereon executed before January term, 1812. B. was not informed of the proceedings in the ejectment suit, until the 27th of May, 1812, and, in August following, applied to set aside the default and subsequent proceedings, and to be let in to defend as landlord; and, it appearing that B. had been discharged, under the insolvent act, in September, 1811, it was held that he had no further right, as landlord, to come in and defend; and that, though he had afterwards, on the 27th of May, 1811, purchased the premises at the sheriff's sale, under an execution on a judgment against him, he could not, in the new character of purchaser, be let in, so long after a regular execution of the judgment in ejectment. Jackson ex. dem. Vanderwerker v. Stiles, 10 Johns. Rep. 67.

If a person be admitted to defend, on payment of costs, and, after entering into the consent rule, keep out of the way, to avoid being served with a copy of the *ca. sa.* against the casual ejector, a rule will be granted to show cause why an attachment should not issue against him; and that service of the rule at the defendant's house shall be sufficient. Jackson ex dem. Jackway v. Stiles, 2 Caines' Rep. 368.

A mortgagee in possession may be let in to defend in an action of ejectment. Jackson ex dem. ——— v. Stiles, 11 Johns. Rep. 407.

A plaintiff in an action of ejectment, brought under the 88th section of the judiciary act, [Vermont,] is not obliged to join a landlord with the tenant in possession, who holds by parol lease, or by written lease, unrecorded, unless it can be proved that the plaintiff had knowledge of the existence of such lease. Wallace v. Farensworth, 2 Tyl. Rep. 924.

The landlord will not be permitted to defend alone in ejectment, until the tenant first neglect or refuse to appear, which should be stated in the affidavit for the motion. Jackson ex dem. Thompson v. Stiles, 1 Cow. Rep. 134.

Where the landlord is admitted to defend alone, judgment may be signed against the casual ejector. Ib.

Where the landlord defends the action without the defendant, who does not appear, it is necessary to prove the defendant, or his tenant, in possession of the premises. Den v. Snowhill, 1 Green's Rep. 23.

See Buford v. Gaines, 6 J. J. Marsh. Rep. 34.

When the tenant has refused to appear, the landlord may be admitted to defend at the term when the declaration is returnable, without waiting for a default. Jackson v. Stiles, 6 Cowen, 589.

After default taken against the casual ejector, the landlord may be let in to defend. Jackson v. Stiles, 4 Johns. 493.

ted to defend as landlord, but only he who had been in *some degree in possession*, as receiving rent, &c.; and upon this *prin- [*258]
ciple the court would not allow a devisee claiming under one will to defend as landlord in an ejectment, brought by a devisee claiming under another will of the same testator.(*a*) But this doctrine was afterwards reprobated by Lord Mansfield, in a case where the principles of the section were fully considered, and the decisions, anterior to the act, investigated and explained.

*"There are, (says Lord Mansfield,) two matters to be considered. First, whether the term '*landlord*,' ought not, as to this purpose, to *extend* to *every* person whose title is connected to, and consistent with, the possession of the occupier, and divested, or disturbed, by any claim adverse to such possession, as in the case of remainders, or reversions, expectant upon particular estates: secondly, whether it does not extend, as between two persons claiming to be landlords *de jure*, in right of representation to a landlord *de facto*, so as to prevent *either* from recovering by collusion with the occupier, without *a fair trial* with the *other*. Where a person claims in *opposition* to the title of the tenant in possession,(*b*) he can in *no* light be considered as landlord: and it would be unjust to the tenant, to make *him* a co-defendant: their defences might *clash*.[1] Whereas, where there is a *privity* between

(*a*) Roe d. Leak *v.* Doe, Barn. 193.
(*b*) Driver d. Oxendon *v.* Lawrence, Blk. 1259.

Twelve years' possession as a purchaser is a sufficient reason for admitting a person to defend in ejectment, in place of the casual ejector. Waters v. Harrison, 4 Bibb, 87.

A purchaser at a sheriff's sale, admitted to defend as constructive landlord. Den v. Green, 1 Spencer, 171. See Elm. Dig. of N. J., 431.

See Doe v. M'Kinney, 5 Ala. Rep. 719.

It is error to allow the landlord of the defendants in ejectment to substitute his own name as defendant, in place of the person sued, without the consent of the plaintiff. Merritt et al. v. Thompson, 13 Illinois Rep. 716.

[1] A person claiming to be let in to defend in ejectment must show that his title is connected to and consistent with the possession of the occupant. Troublesome ex dem. Dougherty v. Estill, 1 Bibb's Rep. 128; Den v. Shape, 1 Green's Rep. 66; Jackson v. M'Evoy, 1 Caines' 151; Doe v. Johnson, 2 Scammon, 522.

In ejectment, a landlord, proving that the tenant entered on the land under him, will be permitted to defend the action, although it appears that the tenant has been found guilty of a forcible detainer against the landlord. M'Clelland v. Doe ex dem. Sprigg, 3 Bibb's Rep. 266.

Landlord admitted to defend can make no defence which the tenant could not make. Crocket v. Lashbrook, 5 Monroe's Rep. 539.

them, their defence must be upon the *same bottom:* and letting the person in behind, can only operate to prevent treachery and collusion.[1]

[*259] It is no answer, "that any person affected by the judgment may bring a new ejectment;" because there is *a great difference between being *plaintiff*, or *defendant*, in ejectment.(*a*)

(*a*) Fairclaim d. Fowler *v.* Shamtitle, Burr. 1290, 94. The principles laid down by Lord Kenyon, C. J., in the case of Lovelock d. Norris v. Dancaster, (3 T. R. 783,) seem to support the doctrine of Lord Mansfield, above mentioned; although, from the omission, in the report of the case, of the facts upon which Lord Kenyon's judgment was founded, the point cannot be clearly ascertained.

It was moved, that the *cestui que trust* might be made defendant in ejectment instead of the tenant, and objected to on the opposite side, because he had never been in possession, and could not be considered as a *landlord* under the statute 11 Geo. II. c. 19, s. 13.

Lord Kenyon, C. J.: "If the person requiring to be made a defendant under the act had stood in the situation of immediate heir to the person last seised, or had been in the relation of remainder-man, under the same title as the original landlord, I am of opinion that he might have been permitted to defend as a landlord, by virtue of the directions of the statute; but here the very question in dispute between the adverse party and himself, is, whether he is entitled to be landlord or not; and therefore we are not authorized to extend the provision of the statute to such a case as this." The rule was discharged.

One claiming in opposition to the title of the tenant is not entitled to be admitted defendant, in ejectment, with the tenant. Jackson ex dem. Walker v. Flint, 2 Cow. Rep. 594.

Nor, *semb.*, is he entitled to be admitted a co-defendant with the landlord of the tenant, though he claim as tenant in common with such landlord, who is willing and requesting to have him joined as defendant. Ib.

Married women who are trustees of a corporation which has expired are not entitled to be admitted to defend an action of ejectment in the place of the tenant, unless their husbands are joined. The People v. Webster, 10 Wen. 554.

A mortgagee in possession may be let in to defend in ejectment. Jackson v. Stiles, 11 Johns. 407; Jackson v. Babcock, 11 Johns. 112; Den v. Fen, 1 Halst. 478. So, also, the assignee of a mortgage. Jackson v. Babcock, 11 Johns. 112.

Premises are actually occupied and possessed by a mere servant, who claims no beneficial interest in them; yet, the action must be brought against such servant, and not against his principal. Shaver v. M'Graw, 12 Wen. 692.

Ejectment will not lie against a remainder-man, during the continuance of the particular estate. Ib.

It seems, that for a dower it can only be brought against the tenant of the freehold. Ib.

When a third person applies to be made a defendant, he must show that he is the landlord or other proper person. Den v. Lanning, 6 Halst. Rep. 185; Buford v. Gaines, 6 Marshall's Rep. 34. (New Series.)

The heirs have a right to defend an ejectment brought against a widow remaining in the house, until her dower is allotted. Porter v. Robinson, 3 A. K. Marsh. 253.

[1] The tenants in possession are the proper, if not the natural defendants to an ejectment; although the landlord has a right to be made a defendant, to prevent his being injured by a combination between the lessor of the plaintiff and his tenant; but, he may waive his right, or, having asserted it, may relinquish it by consent of the lessor of the plaintiff. Herbert v. Alexander, 2 Call's Rep. 498.

*The judgment in this case was not, indeed, ultimately given upon these points; but the principle upon which the statute is to be interpreted, seems to have been established by it; and we may now consider, that the word *landlord* is extended to all persons claiming title, consistent with the possession of the occupier:[1] and that it is not necessary they should previously have exercised any act of ownership over the lands. Thus, the courts have permitted an heir, who had never been in possession, to defend where the father, under whom he claimed, had died just before, having previously obtained the same rule.(*a*) So a devisee in trust, not having been in possession, *was permitted to defend,(*b*) and a mortgagee has been made [*260] defendant with the mortgagor;(*c*) but in a recent case, the

(*a*) Doe d. Heblethwaite *v.* Roe, cited 3 T. R. 783.

(*b*) Lovelock d. Norris v. Dancaster, 4 T. R. 122.

(*c*) Doe d. Tilyard *v.* Cooper, 8 T. R. 685. It does not appear, from the report of this case, whether the mortgagee had previously received any rent; but, from the principles above laid down, the circumstance seems immaterial. (*Sed vide* B. N. P. 95.)

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[1] Every person may be considered as a landlord, for the purpose of being admitted to defend in ejectment, "whose title is connected to, and consistent with the possession of the occupier." Stiles *ads.* Jackson ex dem. Ten Eyck, 1 Wen. Rep. 316.

A person may be admitted to defend as landlord, between whom and the defendant a privity of interest exists, although he do not receive rents, which is not the true test. Wisner et al v. Wilcocks et al., 1 Coleman's Cas. 56.

So, the assignee of a mortgagee may be let in to defend. Jackson ex dem. Clark v. Babcock, 17 Johns. Rep. 112.

When the landlord unites with the tenant in defending the suit in ejectment, it is sufficient to prove the tenant to have been in possession at the commencement of the suit, and his possession is deemed to be the possession of the landlord. Jackson ex dem. Wood v. Harrow, 11 Johns. Rep. 434.

A copy of the rule of court, certified by the clerk, is sufficient evidence that the landlord was admitted to defend. Jackson ex dem. Wood v. Harrow, 11 Johns. Rep. 436.

The admission of a party, claiming a right to defend in ejectment, as landlord, under the ninth section of the Act of the 21st March, 1772, [Pennsylvania,] is an Act of the court, whose duty it is to inquire, before making the order, whether the applicant really stands in the relation of landlord, or whether his claim of the title is consistent with the possession of the occupier. M'Clay v. Benedict, 1 Rawle's Rep. 424.

Where the lessor of the plaintiff claims to recover no more than the interest of the tenant in the premises, subject to the rights of the landlord; or, "claims nothing inconsistent with the rights of the landlord," the landlord will not be let in, for "he has no interest to defend." Stiles *ads.* Jackson ex dem. Wood, 1 Wen. Rep. 103.

But, "when the lessor in ejectment claims an interest, inconsistent with the title of the landlord, the latter may defend." Stiles *ads.* Jackson ex dem. Ten Eyck, 1 Wen. Rep. 317.

Persons cannot be admitted defendants after their agent, whom they permitted to defend for them, has been admitted and confessed a judgment. Bonta v. Clay, 5 Litt. Rep. 129.

court refused to permit a mortgagee to defend, because it did not appear that he was interested in the result of the suit.(*a*)

If a party should be admitted to defend as landlord whose title is inconsistent with the possession of the tenant, the lessor may apply to the court, or to a judge at chambers, and have the rule discharged with costs.(*b*) If, however, he neglect to do so, and the party continue upon the record as defendant, such party will not be allowed to set up such inconsistent title as a defence at the trial.(*c*)

*In the time of Lord Mansfield the Court of King's Bench, in a case which has already been frequently cited, threatened to exercise a stringent act of equitable jurisdiction, with respect to the admission of a person claiming title, to defend an ejectment. The action was brought by one, claiming as the heir of a copyholder; and the lord of the manor, claiming by escheat *pro defectu hæredis*, obtained a rule to show cause, why he should not be admitted defendant. After considerable argument as to the legality of the lord's claim to
[*261] defend, it was agreed *by both parties, at the recommendation of the court, that the then ejectment should be discontinued, and a fresh one brought in the lord's name, in which the heir should be admitted defendant: and Lord Mansfield, C. J., declared afterwards, that if the heir had refused to consent to this arrangement, they would have admitted the lord to defend, and that if the lord had refused his consent, they would have discharged the rule.(*d*)

A wife has been permitted to defend, where the title of the plaintiff's lessor arose from a pretended intermarriage with her, which marriage she disputed.(*e*)

But a parson claiming a right to enter, and perform divine service, has been held not to have a sufficient title to be admitted defendant;(*g*)

(*a*) Doe d. Pearson *v.* Roe, 6 Bing. 613.

(*b*) Doe d. Harwood *v.* Lippencott; Coram Wood, B. Trin. Vac. 1817, MS.; Doe d. Horton *v.* Rys, 2 Y. & J. 88.

(*c*) Doe d. Knight v. Lady Smythe, 4 M. & S. 447; Doe d. Mee v. Litherland, 4 Ad. & Ell. 784.

(*d*) Fairclaim d. Fowler v. Shamtitle, Burr. 1290.

(*e*) Fenwick v. Gravenor, 7 Mod. 71.

(*g*) Martin v. Davis, Stran. 914; *vid. con.* Hillingsworth v. Brewster, Salk. 256.

and, where the application for admission appeared only a device to put off the trial, the court refused to grant a rule.(*a*)

It may be useful to observe, that it is not necessary for the land lord to be made defendant in order to make his title admissible in evidence; but that he may, with the tenant's *consent, defend in the tenant's name. And where a suit was so defended, and the lessor of the plaintiff, having knowledge thereof, obtained *from the tenants a *retraxit* of the plea, and a *cognovit* of the [*262] action, the court directed the judgment to be set aside.(*b*)

Where the party served as tenant in possession appears to the action, the court will not set aside such appearance, on an affidavit of the claimant, that such party has no interest in the premises, if he swear in answer, that he is the under lessee of the parties who are represented by the lessor as the parties really interested.(*c*)

It may here be observed, that when several tenants are in possession, to whom the claimant delivers declarations for different premises, the court will not join them in one action, on the motion of either party, although the claimant has but one title to all the lands; for, if the motion be made on the part of the plaintiff, the court will object, that each defendant must have a remedy for his costs, which he would not have if all were joined in one declaration, and the plaintiff prevailed only against one of them; and, if it be made on the part of the defendants, that the lessor might have sued them at different times, and it would be obliging him to go on against all, when perhaps he might be ready against some of them only.(*d*) But where several ejectments are brought for the †*same premises*, upon the *same demise*, the court, on

(*a*) Fenwick's case, Salk. 257.

(*b*) Doe d. Locke *v.* Franklin, 7 Taunt. 9.

(*c*) Doe d. Turner *v.* Gee, 9 Dow. P. C. 612. It is difficult to understand, how the court can in any case set aside an appearance of a party on whom a declaration has been served *as tenant in possession*, unless it is prepared to try the merits upon affidavit. It would seem that the true principle of the above case is not the one drawn from it; but the following, namely, that when there are *two* tenants in possession, one tenant shall not be permitted to appear for the premises in possession of the other tenant, because the claimant has served the declaration upon him in respect of such tenant, as well as for the premises in his own possession.

(*d*) Medlicot *v.* Brewster, 2 Keb. 524; Smith *v.* Crabb, Stran. 1149.

motion, or a judge at his chambers, will order them to be consolidated;(*a*) and although, where the premises are different, the court will not consolidate the actions, yet where on a rule to show cause why the proceedings in all the causes (which were thirty-seven in number, and brought against the several inhabitants of the houses in Sackville-street) should not be stayed, and abide the event of a special verdict in one of them, as they all depended upon the same title, Lord Kenyon,
[*265] C. J., *said it was a scandalous proceeding on the part of the claimant, and the rule was made absolute.(*b*)

Thus far as to who may appear; we must now consider how the appearance should be made, and the conditions upon which it is allowed.[1]

The appearance should, in all cases, be entered of the term mentioned in the notice; and where the notice was to appear in Hilary term, and the tenant entered an appearance in Michaelmas term, and did nothing farther, and the plaintiff's lessor, finding no appearance of Hilary term, signed judgment against the casual ejector, the court held the judgment regular, but afterwards set it aside, upon payment of costs, to try the merits.(*c*)

When the party who wishes to be made defendant is not the tenant, or *actual* landlord, but *has some interest to sustain*, the court must be moved, on an affidavit of the facts, to permit him to defend with, or without, the tenant, as the case may require.

When the actual landlord appears either jointly with the tenant or alone, counsel's signature is requisite to a motion *(which is motion of

(*a*) Grimstone d. Lord Gower *v.* Burghers, Barn. 176; Roe d. Burlton v. Roe, 7 T. R. 477.

(*b*) 2 Sell. Prac. 144.

(*c*) Mason d. Kendall v. Hodgson, Barn. 250.

[1] The Revised Statutes of New York, part 3, chap. 5, tit. 1, contain the following section: "Sec. 24. The consent rule, heretofore used, is hereby abolished."

A consent rule, in ejectment, for admitting the landlord to defend, need not set out the christian and surname of the lessor of the plaintiff. Doe dem. Spenser et al. v. Read et al., 3 Moore's Rep. 96.

An agreement to confess lease, entry, and ouster of "all the lands described in the defendant's title papers," is not sufficient to authorise the admission of the defendant in ejectment. Carter's Lessee v. Parrot, 1 Tenn. Rep. 65.

To constitute one a defendant, it must appear, of record, that he entered into the consent rule, gave security for the costs, and pleaded not guilty. Price v. Carter, Yerger's Rep. 302.

course, and must be annexed to the consent rule) to admit the landlord and tenant, or landlord only, to defend; accompanied also, when the landlord appears *alone, with an affidavit of the [*266] tenant's refusal to appear.(*a*)

Where the tenant appears alone, no motion is necessary; and it will be only necessary for the attorney to prepare a consent rule, and entitle it, in the margin, with the names of the plaintiff and casual ejector, inserting also therein, in all cases, with as much accuracy as he can, such part of the premises described in the declaration, as he wishes to defend for, and stating in the body the consent of both parties that the tenant be made defendant. He must then sign his name to this paper, which is called the agreement for the consent rule, and take it with the memorandum of appearance to the proper officer for entering appearances, who marks it with the seal of office to denote an appearance is entered, and then delivers it, together with a plea of the general issue, to the plaintiff's attorney, who may then sign the agreement, and take it to the office for rules of the court in which the action is brought, who will draw up the consent rule thereupon:(*b*) which consent rule is, in truth, a copy of the agreement, prefixing only the date of drawing it up, omitting the premises in the margin, and adding, "by the court," instead of the attorneys' names, at the end.

If the tenant refuse to appear, the landlord cannot appear in his name, nor appoint an attorney to do so for him, and an irregular appearance of this sort will be ordered to be withdrawn.(*c*)

When the landlord is admitted to defend without the tenant, judgment must be signed against the casual ejector, *according to the conditions of the consent rule. The reason for this practice is, to enable the claimant to obtain possession of the premises in case *the verdict be in his favor; because, as the landlord is not in [*267] possession, no writ of possession could issue upon a judgment against him.

By a recent rule of court, the tenant may appear and plead within the usual time for appearing, although the claimant has not moved for

(*a*) Hobson d. Bigland v. Dobson, Barn. 179; 2 Sell. Prac. 102; Appendix, No. 29.
(*b*) Appendix, No. 25.
(*c*) Roe d. Cook v. Doe, Barn. 39, 178.

judgment against the casual ejector; and he may move for a judgment of *non pros.*: after he has so appeared and pleaded, although the claimant shall not have entered into the consent rule.(*a*)

When it happens that the lessor of the plaintiff claims land in the possession of different persons, and one of the tenants would be a material witness for the others, such tenant should suffer judgment to go by default as to the part in his possession; because, if he appear, and be made a defendant, he becomes a party to the suit, and consequently cannot be a witness therein; and it seems that if he appear and plead, the court will not afterwards strike out his name upon motion.(*b*)

Where a party has appeared with others, and entered into the consent rule by mistake, and afterwards applies to have the appearance withdrawn and his name struck out of the rule on an affidavit that he is in possession of no part of the premises, the court will grant the application on his undertaking to permit execution to issue for any part of the premises of which he *may* be in possession.(*c*)

With respect to the conditions required from the party *appearing to the action before he is permitted to be made defendant, they are embodied in the consent rule, of which the form(*d*) and purposes have already been cursorily mentioned.(*e*) The object of this rule is to insure a trial upon the merits, and to preclude either party from taking advantage of the fictitious proceedings in the action. It must be entered into by both parties, an attachment will lie against either party for disobedience of it, and it is in substance as follows. The person appearing specifies therein for what premises he intends to defend, and consents—Firstly, to be made defendant instead of the casual ejector. Secondly, to appear at the suit of the plaintiff; and, if the proceedings are by bill, to file common bail. Thirdly, to receive a declaration in ejectment,(*g*) and plead not guilty. Fourthly, at the trial of the issue

(*a*) Doe d. Williams *v.* Smith, 9 Dow. P. C. 1011.
(*b*) B. N. P. 98.
(*c*) Doe d. Snape *v.* Snape, 1 Dow. 314.
(*d*) Appendix, No. 25.
(*e*) Ante, 14.
(*g*) The declaration served upon the tenant, to bring him into court, is the only declaration now delivered.

to confess lease, entry,[1] and ouster, and possession of the premises(*a*)[2] in respect of which he defends,(*b*) and insists upon title only.[3] Fifthly,[4] that if at the trial he shall not confess lease, entry,

(*a*) In the case of Doe d. Parr *v.* Roe, 1 Q. B. Rep. 700, a corporation applied to be permitted to defend without admitting themselves to be in possession, on the ground that the action was brought to enforce an *elegit* against their lands, and that as they only held them for public purposes, they were not liable to the execution. The Court rejected the application.

(*b*) Reg. Gen., H. T., 1 & 2 Geo. IV.

[1] Confession of a lease, entry, or ouster, in ejectment, extends to an entry to complete the title to the action, but not to an entry, which is requisite to regain and revest the possession. Holt's Lessee v. Smith, 1 Harr. & M'Hen. Rep. 273.

Where two defendants are sued jointly in ejectment, they have no right to enter into separate consent rules in the name of each alone. Jackson ex dem. Smith v. Stiles, 3 Cow. Rep. 356.

In an action of ejectment brought against eleven persons in possession of distinct portions of the premises claimed, holding by separate titles, though all derived from the same source but without any connection or community of interest between them, the plaintiff will be compelled, on the application of the defendant, to enter into a separate consent rule with each defendant. Jackson v. Potter, 5 Wen. 96.

Under a special consent rule to admit lease, entry, and ouster, in case an actual ouster be proved, but not otherwise, such ouster must be shown, or the plaintiff will fail. Jackson v. Leek, 12 Wen. 105.

In ejectment, when the defendant has taken general defence, and entered into the common rule, he cannot refuse lease, entry and ouster, for a part only of the tenements laid in the declaration, but must confess for the whole. Wilson's Lessee v. Campbell, 1 Dall. Rep. 126.

Where the defendant confesses the ouster, it is not necessary to prove an actual ouster. Davis v. Whitesides, 1 Bibb. 510; Armstrong v. Timmans, 3 Harrington, 342.

[2] The defendant entered into a special consent rule, describing particularly the premises for which he intended to defend, leaving a residue of the farm, for the recovery whereof the suit was brought, as to which neither the defendant nor any other person appeared to defend. The plaintiff, on entering the rule to appear, &c., had filed the usual affidavit of service of narr., &c., on the defendant, describing him as tenant in possession of the premises, or of some part thereof. Held, that the plaintiff might proceed, and perfect judgment against the casual ejector, and take possession of the residue not described in the special consent rule. Underwood *ads.* Jackson ex dem. Varick, 1 Wen. Rep. 95. Same point, Langendyck et ux. v. Burhans, 11 Johns. Rep. 562.

[3] The lessor of the plaintiff in ejectment is bound to prove the defendant in possession of the land sued for, although the latter have entered into the general consent rule. Alberton v. Heirs of Redding, 1 Nor. Car. Law Repos. 274.

The plaintiff in ejectment must, at the trial, prove the defendant in possession of the premises in question, or he cannot recover. Jackson ex dem. Roberts v. Ives, 9 Cow. Rep. 661; Van Horne v. Everson, 13 Barb. 526.

If the consent rule in ejectment require the defendant to confess, on the trial, the possession of the premises, as well as the lease, entry and ouster, it is evidence of such possession. Rawley v. Doe, 6 Blackf. Rep. 143.

[4] Wise *v.* Wheeler, 6 Iredell, 146; Lee *v.* Flannagan, 7 Iredell, 471; Thompson *v.* Schuyler, 2 Gilman, 271.

[*263] ouster, *and possession, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the costs of the *non pros.*, and suffer judgment to be entered against the casual ejector. Sixthly, when the landlord appears alone, that the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution be stayed until the court shall further order;(*a*) and, Seventhly, where the proceedings are under stat. 1 Geo. IV., c. 87, to give judgment of the term preceding the trial, in case a verdict shall pass for *the plaintiff: and the lessor of the plaintiff consents on his part, that if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, he (the lessor) shall pay costs to the defendant.

This consent rule will, in all cases, be sufficient to prevent a non-suit for want of a real lease, and of a real entry and ouster. When, therefore, an ejectment[1] is brought by a joint tenant, parcener, or tenant in common, against his companion (to support which an actual ouster(*b*) is necessary,) the defendant must apply to the court upon affidavit,(*c*) for leave to enter into a special rule, requiring him to confess lease and entry at the trial, but not ouster also, unless an actual ouster of the plaintiff's lessor by him, the defendant, should be proved:[2] and this

(*a*) Sel. N. P. 644.
(*b*) Ante, 69.
(*c*) Appendix, No. 26.

[1] An affidavit that the tenant "claims as tenant in common with the lessors of the plaintiff; and that as he is advised by counsel and believes, he is tenant in common" with them, is sufficient to entitle him to enter into the consent rule specially. Jackson ex dem. Farmers' Turnpike Co. v. Stiles, 6 Cow. Rep. 391, *et vide* Jackson ex dem. Loomis v. Stiles, 2 Cow. Rep. 585.

But an affidavit "that, as he, this deponent, verily believes, this ejectment will involve a question between tenants in common," is not sufficient. Jackson ex dem. Loomis v. Stiles, 2 Cow. Rep. 585.

To obtain leave to enter into the consent rule specially, the defendant in ejectment must apply to the court, and is, therefore, entitled to have the costs of such application taxed in his final bill of costs, if he be successful. Jackson ex dem. Prindle v. Lytle, 4 Cow. Rep. 16.

The lessor of the plaintiff in ejectment is not bound, of course, to enter into the special consent rule, but only on application to the court. Jackson ex dem. Prindle v. Stiles, 2 Cow. Rep. 442.

[2] Revised Statutes, (part 3, chap. 5, tit. 1,) contain the following sections:

"Sec. 19. It shall not be necessary, on the trial, for the defendant to confess, nor for the plaintiff to prove lease, entry and ouster, or either of them, except as provided in the next

special rule will always be granted,(*a*) unless it appear that the claimant has been actually obstructed in his occupation.(*b*) But this privilege is limited to the co-tenant himself, and will not be extended to his under-tenant.(*c*)

The consent rule must admit the party to be in possession of something for which ejectment will lie. Thus, an admission that the defendant was in possession of "a certain tin-bound (setting out its abuttals,) containing a certain mine, &c," was held insufficient, a tin-bound being a mere easement: the defence should be for the mine which the defendant is working under the tin-bound.(*d*)

In a case where twelve defendants defended jointly, and *entered into a joint consent rule for part of the premises, not specifying the particular premises in possession of each defendant, and by an order of the judge, on the morning of the trial, the names of two of the de-

(*a*) Appendix, Nos. 27, 28.

(*b*) Anon., 7 Mod. 39; Oates d. Wigfall *v.* Brydon, Burr. 1895; Doe d. Ginger *v.* Roe, 2 Taunt. 397.

(*c*) Doe d. Wills *v.* Roe, 4 Dow. P. C. 628.

(*d*) Doe d. Earl of Falmouth *v.* Alderson, 1 M. & W. 210.

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section; but this section shall not be construed to impair, nor in any way to affect, any of the rules of evidence now in force, in regard to the maintenance and defence of the action."

"Sec. 20. If the action be brought by one or more tenants in common, or joint tenants, against their co-tenants, the plaintiff, in addition to all other evidence which he may be bound to give, shall be required to prove, on the trial of the cause, that the defendant actually ousted such plaintiff, or did some other act amounting to a total denial of his right as such co-tenant."

If the defendant claim title as tenant in common, he ought to enter into the consent rule specially; otherwise, if he enters into the usual consent rule, he cannot object that no actual ouster was proved at the trial. Jackson ex dem. Denniston et al. v. Denniston, 4 Johns. Rep. 311.

In an action of ejectment by one tenant in common, who has not been ousted, against his co-tenant, the latter may enter into the consent rule, where he does not dispute the title, as to part of the premises only, and the plaintiff may take judgment as to the residue, by default, and recover the *mesne* profits thereof from his co-tenant. Langendyck et ux. v. Burhans, 11 Johns. Rep. 461.

It seems that in such case, where the title is not denied, the tenant need not stipulate to confess ouster. Ib.

Where the defendant in ejectment means to defend as tenant in common with the lessors of the plaintiff, on the ground that there has been no ouster of the co-tenants, he should apply to the court, on affidavit, for leave to enter into the consent rule specially, stipulating to confess lease and entry only, not ouster, unless an actual ouster of the lessors should be proved at the trial. Jackson ex dem. Jones v. Lyons, 18 Johns. Rep. 398.

fendants, who had no valid defence for the portions in their respective possessions, were struck out of the record, but no order was made for altering or amending the consent rule; and the trial went on, (the judge refusing to non-suit for want of the appearance or confession of the two defendants whose names were struck out) and the other ten established a defence, and had a verdict. It was held that the consent rule was not virtually amended by this order, and that consequently, as the ten defendants had appeared for the premises in the possession of the two, as well as of those in their own possession, the plaintiff was entitled to a general verdict, and the general costs of the cause, limiting his execution to the premises in the possession of the two defendants, and paying to the ten defendants the costs of defending for the premises to which they proved title.(*a*)[1]

(*a*) Doe d. Bishton *v.* Hughes, 5 Tyr. 957; 4 Dow. P. C. 412.

[1] In ejectment against several defendants, though they sever in their pleadings, and enter into separate consent rules, the notices and pleadings must be entitled against all, as at the commencement, but each party must be served with a separate notice, &c. Jackson ex dem. Jauncey v. Cooper, 1 Caines' Rep. 19.

Though a plaintiff in ejectment cannot compel two defendants, having several interests, to submit to a joint trial, yet they may conclude themselves, by a joint appearance and plea. Lessee of Burkhart et al. v. Row et al., 4 Yeates' Rep. 272.

The court will not relieve a defendant from the consequences of a rule to consolidate, though he denies that it has been entered by his authority; his remedy is against his attorney. Hendrickson v. Hendrickson, 3 Green's Rep. 102.

In the cases of Jackson ex dem. Pioneer and others v. Schauber, and The Same ex dem. The Same v. Different Defendants, in ten other cases, (4 Cow. Rep. 78, 79,) the court said: "Where a number of causes are brought, and all depend upon the same title, as here, and the questions to be litigated and the evidence are the same in all, it is competent for either party to make an application to this court, before the circuit arrives, that only one of the causes be carried down to trial; and that the plaintiff be not prejudiced by his omission to try others; and, in a clear case, that they abide the event of the cause to be tried. In passing upon such a motion, the court would be guided by the admissions of the party against whom the motion should be made. If the affidavits of the parties should agree that the points of inquiry and the evidence would be the same in all the causes, the motion would be granted. If they should disagree, though they should only leave the matter in doubt, the motion would be denied."

In the cases of Jackson ex dem. Swartwout and wife v. Stiles, Chamberlin, tenant, and The same ex dem. the same v. The same in five other actions of ejectment against different tenants, (5 Cow. Rep. 282.)

J. Seelye, (on behalf of the tenant,) moved to consolidate these causes on an affidavit made by the partner of the attorney for the tenants, "that he was well acquainted with the titles of both parties, &c., that he was informed and believed, and had good reason to believe, that the lessors had caused these actions to be brought on the same ground, and the same title which they set up in Jackson ex dem Swartwout and wife v. Johnson, [decided in favor of the plaintiff, 5 Cow. Rep. 74,] that the plaintiff's title in all these causes is the same

The present form of the consent rule precludes the necessity of proof, at the trial, of the possession by the defendant of the disputed

and derived from the same source; and that the plaintiff's evidence, on the trial, would be substantially the same in each. That, as he was informed and believed, the tenants all claimed title from the same source; and that the same evidence would be adduced by all the tenants, on the trial, varying only in the manner of conveying down the title to them. That the venues were all laid in the county of Otsego; and the demises all laid on the same day. That he verily believed that a trial in one would settle the plaintiff's right in all the other causes."

The motion was founded on the authority of Jackson v. Schauber, (4 Cow. Rep. 77,) and,

J. O. Morse and *D. Cady*, contra, agreed that, within the case cited, one of these causes should determined the whole; and the only question was, whether the court would designate the cause to be tried; or the attorney for the plaintiff should elect on noticing for trial.

Seelye insisted that the court should name the cause in the rule.

Cady said, this would be unsafe; for the defendant might die before the notice of trial served; and the cause thus be abated.

The court made the following rule:

"That all the causes abide the event and final determination of the one which the plaintiff may elect to notice for trial; and that, whatever judgment may finally be rendered in the cause thus noticed for trial, shall be entered in all the other causes; and the party prevailing shall be at liberty to make up and file records therein accordingly."

In ejectment, the landlord may move to defend at the term when the declaration is returnable: he will not wait till a default is entered against him: if the defendant expressly refuse to appear, it is enough. Jackson ex dem. Bugbee et al. v. Stiles, 6 Cow. Rep. 589.

The affidavit on which to move that the landlord defend in ejectment should show the relation of landlord and tenant. That the tenant claims no interest except as tenant to the landlord, is not sufficient. Jackson ex dem. Brinckerhoff v. Stiles, 6 Cow. Rep. 594.

On motion, to be received, to defend as landlord in ejectment; it is competent for the plaintiff to show that the landlord had, after the lease, conveyed away all his interest in the premises in question. Jackson ex dem. Howland v. Stiles, 5 Cow. Rep. 447.

A. leased a lot of land to B., and the lease contained a power of re-entry for non-payment of the rent, &c. B. leased the same premises to C. by parol. A. brought an action of ejectment for the recovery of the premises, under the 23d section of the act, (sess. 11, c. 36,) for non-payment of the rent, &c., and a judgment by default was entered on the 28th of September, 1811, against the casual ejector, and final judgment entered on the 23d of December, 1811, and a writ of possession thereon executed before January term, 1812. B. was not informed of the proceeding in the ejectment suit, until the 27th of May, 1812, and in August following appealed to set aside the default and subsequent proceedings, and to be let in to defend as landlord; and it appearing that B. had been discharged under the insolvent act, in September, 1811; it was held that he had no further right as landlord to come in and defend; and that, though he had, afterwards, on the 27th of May, 1812, purchased the premises at the sheriff's sale, under an execution on a judgment against him, he will not, in the new character of the purchaser, be let in, so long after a regular execution of the judgment in ejectment. Jackson ex dem. Vanderwerker v. Stiles, 10 Johns. Rep. 67.

Defendants in ejectment, after they have taken a joint defence, are not permitted at the trial to sever their defence. Carrol et al. v. Norwood, 2 Harr. & Johns. Rep. 182.

premises, and as the consent rule is now annexed to the record, no questions can arise as to the necessity of its production as part of the plaintiff's case. It would seem, however, that such production, in case the plaintiff should omit to annex the rule to the record, is necessary in three cases, namely, when it appears by the evidence that the lessor of the plaintiff and the defendant are joint tenants, parceners or tenants in common, and no actual ouster is proved; when there is a contention at the trial that the defendant does not defend for the premises to which the plaintiff is directing his case;(*a*) and when, upon the defendant's refusal to confess, the lessor elects to proceed for the mesne profits under stat. 1 Geo. IV. *c. 87, s. 2. It appears also from a recent decision that the defendant may be called upon to confess lease, entry, and ouster, in the ordinary manner, although the consent rule shall not have been drawn up.(*b*)

The consent rule may be drawn up, where the tenant has appeared and pleaded, although no rule for judgment against the casual ejector has been obtained.(*c*)

It need not set out the Christian and surname of the lessor of the plaintiff.(*d*)

When several tenants are in possession of the premises, and the landlord defends alone, a separate consent rule must be entered into in each separate action; and if the landlord enters into one consent rule only, although such rule shall comprise all the disputed premises, the

(*a*) Doe d. White *v.* Cuff, 1 Camp. 173; Doe d. Lamble *v.* Lamble, 1 M. & M. 237; Doe d. Greaves *v.* Raby, 2 B. & Ad. 948.

(*b*) Doe d. Fleming *v.* Armfield, 1 Dow. N. S. 327.

(*c*) Doe d. Kerr *v.* Roe, 7 Scott, 701.

(*d*) Doe d. Spencer *v.* Reid, 3 Moore, 96.

After several persons, who have been jointly tried in ejectment, have entered into the common rule, and pleaded jointly, they cannot avail themselves of the circumstance of their being tenants in severalty of distinct parcels of land. Abney et al. v. Barnet, 1 Marsh Rep. (Ky.) 107.

After a judgment by default against the casual ejector, the landlord may be let in to appear and defend. Jackson ex dem. Cantine v. Stiles, 4 Johns. Rep. 493.

Where, in ejectment, a person obtains a rule to defend as landlord, the plaintiff, nevertheless, may sign judgment against the casual ejector, but may not take out execution without further order: held, that, after verdict and judgment against the landlord, execution may be issued against him, without any further order of the court. Doe ex dem. Lucy v. Bennet, 4 Barn. & Cress. Rep. 897.

same may be treated as a nullity, and judgment signed against the casual ejector. In the particular case in which this rule was established, the number of tenants was thirteen, and the attorney comprised a certain number of them and a certain portion of the premises in each declaration, that is to say, A., B., C., and D., and thirty messuages in four declarations, E., F., G., and H., and thirty messuages in four other declarations, &c., intending to bring four separate actions, and each declaration was entitled Doe "on the demise of S. T." The landlord entered into a consent rule, comprising all the premises in all the declarations and entitled it Doe "on the several demises of S. T.," and the point was decided by Coleridge, J., on the ground that the rule was not entered into in any cause which had existence, inasmuch as it was entered into in a cause in which "there were *several* demises of S. T.," and for the recovery "of 120 *messuages," whereas there was but one demise in any of the ejectments brought by the lessor of the plaintiff, and no action brought for more than thirty messuages.(*a*) It would seem that in similar cases the landlord should be guided by the number of rules moved for against the casual ejector; or by the number of tenants included in each notice to appear, in case he is desirous of appearing under the rule of Hilary Term, (1 Vict.) before judgment is moved for.(*b*)

*The plea of the general issue, we have before observed, is [*269] to be left by the defendant with the agreement for the consent rule; and, when this is the case, as soon as the consent rule is drawn out, the issue may be made up with a copy of the rule annexed (introducing the defendant's name instead of that of the casual ejector in the declaration and issue) and an ingrossment of the issue is then to be delivered to the defendant's attorney, with notice of trial as in other actions. But if the plea be not left with the consent rule,(*c*) the plaintiff must give a rule to plead, and then judgment may

(*a*) Doe d. Faithful *v.* Roe, 7 Dow. P. C. 718.

(*b*) Doe d. Vorley *v.* Roe, 2 Dow. P. C. 52.

(*c*) Where the plea was entitled with the true name of the cause, but by mistake, in the body of the plea, the name of the lessor was inserted as the person complaining, instead of that of the plaintiff, and the lessor's attorney, looking upon this plea as null and void, signed judgment against the casual ejector; the judgment was set aside with costs, as irregular, for the plea was properly entitled, and not a nullity. Goodtitle d. Gardiner *v.* Badtitle, Barn. 191.

[*270] be entered for want of a plea[1] as in other actions, *without a special motion in court for the purpose.(*a*)

OF THE PLEA, AND ISSUE.[2]

The general issue in this action is, not guilty;(*b*) and it seldom happens, by reason of the consent rule, that the *defendant can plead any other plea. It is not, indeed, easy to imagine a case, in which any other plea in bar can be necessary; for, as the claimant must, in the

(*a*) Reg. Hil. 1649, and Trin. 18 Car. II. B. R.
(*b*) Appendix, No. 30.

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[1] After entering into the consent rule in ejectment, the plaintiff must, before he can enter a default, serve a new or altered declaration. Jackson ex dem. Wood et al. v. Wood et al., 6 Cow. Rep. 586.

The tenant must plead at the time he signs the consent rule. Jackson ex dem. Van Allen v. Visscher, 2 Johns. Cas. 106; S. C., Coleman's Cas. 115.

The signing the consent rule, delivering a new declaration, putting in common bail, and filing a plea, are all simultaneous acts. Jackson ex dem. Quackenboss v. Woodward, 2 Johns. Cas. 110: S. C., Coleman's Cas. 120.

Where the defendant's attorney filed a consent rule without a plea, and, after having agreed to exchange consent rules with the plaintiff's attorney at home, neglected, when called upon to plead without a rule for that purpose, and the plaintiff's attorney took judgment for default of a plea against the casual ejector: held, the judgment was regular. Den ex dem. Bray et al. v. Fen, 3 Halst. Rep. 303.

[2] The Revised Statutes (part 3, ch. 5, tit. 1,) contain the following sections:

Sec. 17. "A defendant in ejectment may, at any time before pleading, apply to the court, or to any judge thereof in vacation, to compel the attorney for the plaintiff to produce to such court or officer, his authority for commencing the action in the name of any plaintiff therein.

Sec. 18. "Such application shall be accompanied by an affidavit of the defendant, that he has not been served with proof in any way, of the authority of the attorney to use the names of the plaintiffs stated in the declaration.

Sec. 19. "Upon such application, the court or officer shall grant an order requiring the production of such authority, and shall stay all proceedings in the action, until the same be produced.

Sec. 20. "Any written request of such plaintiff or his agent, to commence such action, or any written recognition of the authority of the attorney to commence the same, duly proved by the affidavit of such attorney or other competent witness, shall be sufficient presumptive evidence of such authority.

Sec. 21. "If it shall appear, that, previous to such application by any defendant, he was served with a copy of the affidavit of the plaintiff's attorney, showing his authority to bring such action, such application shall be dismissed, and such defendant shall be liable for the costs of resisting such application; the payment of which may be compelled, as in other cases."

first instance, prove his right[1] to the possession, whatever operates as a bar to that right, must cause him to fail in proving his title, and consequently entitle the defendant to a verdict upon the general issue.(*a*)[2] As, however, the consent rule was introduced for the purposes of justice, the courts would undoubtedly permit the defendant to plead specially, if the particular circumstances of the case should require it.(*b*)

A plea to the jurisdiction may be pleaded in ejectment by permission of the court, but not otherwise. This permission is necessary, because a plea to the jurisdiction is a plea in abatement, and must therefore be pleaded within the four first days of the term *next ensuing that of which the declaration is entitled, at [*271] which time the casual ejector, and not the tenant, is defend-

(*a*) In the time of Lord Coke, (Peytoe's case, 9 Co. 77,) an accord with satisfaction was held to be a good plea in ejectment, "because an ejectment is an action of trespass in its nature, and in trespass accord is a good plea;" but as this plea is quite inapplicable to the modern uses of the action, the court, it is conceived, would not at this time allow a defendant to plead it.

(*b*) Phillips *v.* Bury, Carth. 180.

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[1] A defendant in ejectment will not be allowed to confine his defence to that part of the premises of which the plaintiff can prove him to be in possession. Carter v. Branch, 1 Hayw. Rep. 135.

The defendant in ejectment cannot avail himself of his possession anterior to the date of the plaintiff's patent. Chiles v. Calk, 4 Bibb's Rep. 554.

A fine was levied by A., in Hilary term, 1821. A. and B. claimed to be heir at law of C. There being several actions depending to try whether A. or B. was heir at law, it was agreed that the rent should be paid into a banker's to abide the event of one of those causes. The cause was decided in favor of A., in 1823, and the rent paid into the banker's was then paid over to him. It included half a year's rent due from the tenant, on the 25th March, 1821; held, in an ejectment brought subsequently on the demise of B, in which he succeeded in showing that he was heir at law of C., that A. had no seisin in Hilary term, 1821, when the fine was levied, and consequently that the fine did not operate as a bar to the ejectment. Doe ex dem. Lidgbird v. Lawson et al., 8 Barn. & Cress. 606.

[2] A judgment in ejectment by default, has the same effect as a judgment upon a verdict. Bradford v. Bradford, 5 Conn. Rep. 127.

Judgment for a defendant, in a writ of forcible entry, &c., is no bar to the plaintiff's proceeding by ejectment to recover possession of the same land. Mattox, &c., v. Helm, 5 Litt. Rep. 185.

An ejectment in the name of lessee, is no bar to another in a different name. Bonta, &c., v. Clay, 5 Litt. Rep. 139.

The plea of the general issue denies the whole cause of action. Stevens v. Griffith, 3 Verm. 448.

A plea of estoppel to an action of ejectment is allowable. Crandall v. Gallup, 12 Conn. Rep. 365.

ant. To obtain leave to plead such plea, the court must be moved upon affidavit, before the expiration of the first four days of term, the plea itself being first filed; and the motion should be for a rule to show cause why the defendant should not be permitted to plead the facts stated in the affidavit; and why the plea then filed to that effect should not be allowed. The latter part of the rule, and the filing of the plea, are necessary parts of the application, because the four days would in all probability expire before cause could be shown and the plea pleaded, unless such plea were pleaded *de bene esse* in the first instance.(*a*)

*Such, at least, has been the mode of proceeding in the only two reported cases upon the subject, which can be cited as authorities. But a practical difficulty occurs, for which these cases seem not to provide. At the time when the application for leave to plead to the jurisdiction is made, the tenant has not appeared, and the proceedings are against the casual ejector. By whom then should the plea be pleaded, and how is the tenant to appear? The most simple method of avoiding these difficulties, is for the tenant in the first instance to file the plea in his own name, and then move for a rule to show cause "why he should not be forthwith admitted defendant upon the usual terms, except as far as relates to pleading the general issue, [*272] and why he should not be permitted *to plead the facts stated in the affidavit, upon which he moves in lieu thereof, and why the plea already filed by him to that effect, should not be allowed."

Ancient demesne is a good plea in ejectment;(*b*) but it is a plea much discouraged, and the person pleading it must carefully observe every form which the court deems necessary. As it is a plea in abatement, application for leave to plead it, must, as has already been stated, be made within the four first days of term; and the application must be accompanied by an affidavit, that the lands are holden of a manor which is ancient demesne, that there is a court of ancient demesne regularly holden, and that the claimant has a freehold interest; and the court will refuse the motion, if any of these facts be omitted in the affidavit.(*c*)

(*a*) Williams d. Johnson *v.* Keen, Blk. 197; Doe d. Morton *v.* Roe, 10 East, 523.
(*b*) Appendix, Nos. 31, 32.
(*c*) Doe d. Rust *v.* Roe, Burr. 1046; Denn d. Wroot *v.* Fenn, 8 T. R. 474.

Ancient demesne cannot of course be pleaded where the ejectment is brought for copyhold lands;(*a*) but if the affidavit state that the lands are ancient demesne, the court will not *reject the plea upon a counter affidavit that great part of the lands are copyhold; but will leave the plaintiff to state such matter in his reply.(*b*)

When the party appearing has entered into the consent rule and pleaded, he may move for a rule to reply, before the plaintiff's lessor has joined in the *consent rule, and *non pros.* the [*273] plaintiff; and from recent decisions it is probable that the courts would compel the lessor of the plaintiff to pay the costs, although a contrary rule formerly prevailed in such case.(*c*)[1] After issue joined, the defendant also may move for judgment as in case of a non-suit, although the lessor of the plaintiff has not joined in the consent rule.(*d*)

The issue must agree with the declaration against the casual ejector in all respects, except in the defendant's name, unless an order for the alteration be obtained; and if there be a difference between the issue and the declaration, the court on motion will set it right.(*e*)[2] But where there was a variance between the description of the premises in the *Nisi Prius* record (upon which the plaintiff recovered,) and the

(*a*) Brittle *v.* Dade, Salk. 185; S. C., Ld. Raym. 43.
(*b*) Doe d. Morton *v.* Roe, 10 East, 523.
(*c*) Goodright d. Ward *v.* Badtitle, Blk. 763.
(*d*) Doe d. Williams *v.* Smith, 9 Dow. P. C. 1011.
(*e*) Bass *v.* Bradford, Ld. Raym. 1411.

[1] This court will not make a rule on the lessor of the plaintiff to pay costs on a judgment of *non pros.* against him, for refusing to join in the consent rule. Anonymous, 3 Halst. Rep. 268; Boner v. Smith, 7 Monroe's Rep. 378.

[2] Under the acts of 21st March, 1806, and 13th April, 1807, [Sm. Laws, 476,] a formal joinder of issue in ejectment is not necessary. Immediately on the plea of not guilty being put in, issue is considered as joined. Gallagher v. M'Nutt, 3 Serg. & R. Rep. 409.

In ejectment the demise was laid to be by the mayor, burgesses, &c., of the borough town of M., and, on the trial, it turned out from the charter that the name of the corporation was, "the mayor, &c., of M.;" held, that this was no variance, it appearing from the charter which was in evidence, that M. was a borough town. Doe dem. Mayor, Aldermen, Capital Burgesses, and Commonalty of Malden, v. Miller, 1 Barn. & Ald. Rep. 699.

A plaintiff states in his declaration that he has an estate in the premises for the life of another, and it turns out in proof that he has title in himself by possession, and also as guardian in socage; and the judge at the circuit grants a non-suit for the variance. A motion to set aside the non-suit was refused; but the plaintiff was let in to a new trial upon payment of costs. Holmes v. Seeley, 17 Wen. 75.

issue, and it did not appear how the premises were described in the declaration, the court refused to set the verdict aside.(*a*)

If the party interested appear and plead, and, after having pleaded, withdraw his plea, the judgment must be entered against the party so appearing;[1] but where the costs of the suit were defrayed by the landlord in the name of his tenants *who gave a *retraxit* of the plea, and a *cognovit* of the action, the court set aside the *retraxit* and *cognovit*, and permitted the landlord to defend the action in his own name.(*b*)

[*274] The record and issue are made up with memorandums, if the proceedings are by bill; and without any *memorandum, if by original, as in other actions: the time allowed for notice of trial is also the same.

A plea *puis darrein continuance*, it seems, may be pleaded to this action;[2] but where the plea was that after issue joined, one of the lessors of the plaintiff had released to the defendant,[3] the court held the plea insufficient, and said the release ought to have been by the nominal plaintiff; because although in every other respect the court would look upon the lessor as the interested person, as far as the record was concerned they must consider the nominal plaintiff as the real

(*a*) Doe d. Cotterell *v.* Wylde, 2 B. & A. 471; Jones *v.* Tatham, 8 Taunt. 634.
(*b*) Doe d. Lock *v.* Franklin, 7 Taunt. 9.

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[1] Where the lessor of the plaintiff in ejectment entered on the premises and possessed himself thereof, pending the suit, he was held liable to pay the costs of the suit. Gubbs v. Ellis, 2 Nor. Car. Law Repos. 612.

[2] Matter of defence, arising after issue joined, must be pleaded *puis darrein continuance*. Jackson ex dem. de Forrest and M'Michael v. Ramsey, 3 Cow. Rep. 75.

This rule applies as well to ejectment as to other actions; as, where the defendant acquires title by deed, after issue. Ib.

But, where R. purchased the premises at sheriff's sale, on a judgment and execution against M., and took no deed; and then M.'s devisee brought ejectment, after issue joined, in which R. obtained a sheriff's deed: held, that this need not be pleaded, but might be given in evidence upon the general issue. Ib.

[3] The plaintiff in ejectment cannot recover under a demise from a lessor, who has released his interest to the defendant, he being estopped by such release from claiming any title. Jackson ex dem. Bonnell et al. v. Foster, 12 Johns. Rep. 488.

It seems that the defendant cannot plead a release from the lessor of the plaintiff, to defeat the action; James Jackson being the real plaintiff on record. Jackson ex dem. Allen *v.* Bell, 19 Johns. Rep. 168.

party.(*a*) A release by the nominal plaintiff so pleaded, would certainly, when the old practice prevailed, have been a good defence to the action; but even then the courts held such a release to be a contempt,(*b*) and it may be doubted whether a judge would receive the plea at the present day.

When the ancient practice prevailed, if the plaintiff in ejectment after issue joined, and before the trial, entered into any part of the premises, the defendant at the assizes might plead such entry as a plea *puis darrein continuance.*[1] But this plea cannot now be ever necessary; for the plaintiff, being a fictitious person, cannot enter upon the land; and if the lessor of the plaintiff should enter, he would be unable at the trial to prove the possession of the defendant, and must consequently fail in his ejectment.(*c*)[2]

(*a*) Doe d. Byne *v.* Brewer, 4 M. & S. 300.
(*b*) Ante, 160.
(*c*) Moore *v.* Hawkins, Yelv. 180.

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[1] Alienage may be given in evidence under the general issue. Jackson ex dem. Johnson et al. v. Decker, 11 Johns. Rep. 418.

But where issue has been joined on the demise of an alien residing in England, claiming to hold land under the act of 2d of April, 1798, (sess. 21, chap. 72,) before the declaration of war, his alienage must be pleaded *puis darrein continuance.* Jackson ex dem. Smith et al. v. M'Connell, 11 Johns. Rep. 424.

[2] It is not cause of abatement of ejectment that the plaintiff entered into the possession of the premises pending the action. Venner *v.* Underwood, 1 Root's Rep. 73.

*CHAPTER IX.

Of the Evidence in the Action of Ejectment.

[*275] *THE proofs by which a claimant in ejectment is required to support his claim, not only vary with the nature of his title to the premises, but are also dependent on the position in which he is placed, with respect to the defendant.[1] When no privity has existed

[1] Parol declarations are inadmissible to prove or disprove title, or a disclaimer of title to lands. Jackson ex dem. Williams et al. v. Miller, 6 Cow. Rep. 751.

But where the tenant, having no title in himself, admits that the plaintiff is the owner of the premises, the plaintiff is entitled to recover upon the parol acknowledgment. Jackson v. Dennison, 4 Wen. 558.

"Acknowledgments of the party, as to title to real property, are generally a dangerous species of evidence; and though good to support a tenancy, or to satisfy doubts in cases of possession, they ought not to be received as evidence of title." Jackson ex dem. Burr et al. *v.* Sherman, 6 Johns. Rep. 21.

Parol evidence of a disclaimer of title to real property is inadmissible. Jackson ex dem. Van Alen et al. v. Vosburg, 7 Johns. Rep. 186; Jackson ex dem. Livingston *v.* Kisselbrach, 10 Johns. Rep. 336, 338; Brandt ex dem. Cuyler et al. v. Livermore, ib. 358; Jackson ex dem. White *v.* Carey, 16 Johns. Rep. 302; Jackson ex dem. Van Schaick et al. *v.* Davis, 5 Cow. Rep. 133.

In ejectment by a landlord against his tenant, the latter cannot show in his defence, that the landlord has acknowledged, by parol, that the title is in another. Jackson ex dem. Van Schaick et al. v. Davis, 5 Cow. Rep. 124.

But if the tenant have actually purchased of, or attorned to another, with his landlord's consent or encouragement, this throws the burden of proving title upon the landlord, the same as if the action had been against a stranger holding adversely. Ib.

In ejectment the lessor of the plaintiff shall not be obliged to show his title further back than from the person last seised, first showing the estate to be out of the commonwealth. Said by M'Kean, Ch. J., to have been ruled by him at Lancaster. Shirder's Lessee v. Nargan, 1 Dall. Rep. 68.

A title to lands for taxes can be perfected only by giving notice of the purchase, &c., to the person in possession or occupancy of the lands, if the lands be occupied, and producing the certificate of the comptroller that the payments required to be paid into the treasury have not been made. Jackson *v.* Esty, 7 Wen. 149.

A waiver of the notice by an occupant having no interest in the property sold is not equivalent to a notice. Ib.

A plaintiff claiming the premises in fee is entitled to recover, although he only show title by possession. Day *v.* Alverson, 9 Wen. 223.

Neither an actual entry under title, or the actual receipt of profits, need be shown to maintain ejectment; it is sufficient to show a right to the possession at the time of the commencement of the suit. Siglar *v.* Riper, 10 Wen. 414.

between the parties; that is to say, when neither the defendant, nor those under whom he holds, have been immediately or derivatively ad-

The plaintiff, on showing himself to be a proprietor in town, need not show a division until the defendant also shows an interest which makes him tenant in common with the plaintiff. Coit *v.* Wells, 2 Verm. Rep. 318.

Where the defendant's title is derived from the plaintiff by levy of execution upon the lands in question, he cannot object to the plaintiff's introducing a deed of the same to substantiate his title from a third person executed to him while defendant is in possession, on the ground that such possession is adverse, even should the levy prove void. Hall *v.* Hall, 5 Verm. Rep. 304.

A son who remains in possession of the real estate after his father's decease, under a family arrangement, without letters of administration taken out, or any legal settlement or division thereof, cannot maintain an action of ejectment therefor. Boardman *v.* Bartlett, 6 Verm. Rep. 631.

"A man sued in ejectment may defend the suit, and nevertheless agree to purchase the title of the plaintiff, in case the plaintiff should prove successful." Wilcox *v.* Calloway, 1 Wash. Rep. 38.

In an action of ejectment, evidence cannot be introduced to prove that a patent was irregularly obtained. Witherington *v.* M'Donald, 1 Hen. & Munf. Rep. 303.

Quære. Whether, in such case, evidence is admissible that a patent was obtained by fraud. Ib.

Where the plaintiff had read in evidence a deed from one under whom he claimed, reciting that possession of the land in dispute had been delivered to A., according to contract, it was held, that to rebut the presumption of an outstanding title in A., he might show that A. admitted he had sold to another who had sold to the plaintiff. Lessee of Packer *v.* Gonsalus, 1 Serg. & R. Rep. 526.

In ejectment the plaintiff may give in evidence that certain deeds necessary to make out his title, are in the hands of, and detained by, a third person, under whom the defendant claims as lessee. Morris' Lessee v. Vanderen, 1 Dall. Rep. 65.

A decree of the court of a county, requiring a defendant residing within its limits, to execute a conveyance for lands lying in another county, can be enforced upon the person only of such defendant, and does not, of itself, vest any legal title in the complainant. If offered as evidence of such title in an action of ejectment, it ought not to be received. Aldridge et al. v. Giles et al., 3 Hen. & Munf. Rep. 136.

Where the lessor of the plaintiff is a fictitious person, instead of the lessee, evidence on the part of the plaintiff not going to show a title in the lessor, ought to be excluded. Butts *v.* Blunt et al., 1 Rand. Rep. 255.

A lease for a year to A. and his wife, will support a release to A. and a third person. Doe ex dem. Saunders *v.* Cooper, 1 Holt's Rep. 461.

A deed of conveyance under which the lessor of the plaintiff claims title in ejectment is proved to have been altered in a material part of the execution; it seems that the deed is still admissible in evidence. Doe ex dem. Beanland et al. *v.* Hirst, 3 Stark. Rep. 60.

In ejectment for lands sold by a constable under the act of 30th December, 1777, [Pennsylvania,] for not serving a tour of duty in the militia, the vendee must show the warrant of the lieutenant to the constable, and all the other steps preliminary to the sale, as required by law. Goodright, Lessee, &c. *v.* Probst, 1 Yeates' Rep. 300.

In ejectment the plaintiff may give evidence to show that he articled to sell the land to a third person, and afterwards recovered it from him in ejectment for the purpose of showing a former possession in himself. Vanhorn *v.* Frick, 3 Serg. & R. Rep. 278.

mitted into possession, either by the lessor of the plaintiff himself, or those under whom he claims, the lessor must establish a *legal* title to the premises ;(*a*)[1] because, as has been already observed, it is by the strength of his own title, and not by the weakness of his adversary's, that he must prevail.(*a*)[2] But where there has been a privity between

(*a*) Ante, 28.

A warrant was taken out and paid for by a father in the name of his sons, and, on ejectment brought, the question being whether the warrant was designed by the father as an advancement to his sons, or whether a trust resulted to him ; it was decided that evidence might be given of acts of ownership on the land by the father, and of declarations to explain those acts in order to rebut the presumption that the land was intended as an advancement. Sampson *v.* Sampson, 4 Serg. & R. Rep. 329.

A surveyor's original book of surveys and his parol testimony, admitted by the general court, in an action of ejectment, as competent evidence to prove that a certificate of survey returned to the land office was forged. Boerings' Lessee *v.* Singery, 2 Har. & Johns. Rep. 455.

An indorsement on a deed is part of a deed, and should be admitted in evidence. Stone *v.* Hansbrough, 5 Leigh's Rep. 425.

A deed of bargain and sale by a bargainor, not having actual possession of the land, nor that statutory possession, which he might acquire as bargainee from some other person having actual possession, conveys no title under which his bargainee can recover in ejectment. Tabb *v.* Baird, 3 Call's Rep. 480.

A deed of bargain and sale and release of land, from a person not in possession to another in the same predicament, (the land being at the time, held by a third person with adverse title,) passes nothing; and, therefore, does not divest the bargainor of his right to recover in ejectment. Hopkins et al. *v.* Ward et al., 6 Munf. Rep. 38.

If a person out of possession of land held adversely, convey the same to another, the title still continues in the grantor, and he may maintain ejectment. Williams *v.* Jackson ex dem. Tibbitts et al., (in error,) 5 Johns. Rep. 489. Jackson ex dem. Youngs et al. *v.* Vredenburgh, 1 Johns. Rep. 159.

And where, in an action of ejectment, several demises were laid, one from the grantor, and another from the grantee of such a deed, it was held, that the plaintiff might recover, though he could not on the demise of the grantee only. Williams *v.* Jackson ex dem. Tibbitts, (in error,) 5 Johns. Rep. 489.

[1] The New York Revised Statutes, part 3, ch. 5, tit. 1, sec. 3, provide that:

"Sec. 3. No person can recover in ejectment, unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial." Marshall v. Dupey, 4 Marshall's Rep. 389. (New series.) Coleman v. Mabberly, 3 Monroe's Rep. 222.

The Revised Statutes of Michigan have the same provisions. (Rev. Sts. of Mich., ch. 108, sec. 3.) So, also, Revised Statutes of Wisconsin. (Rev. Sts. of Wis., ch. 106, sec. 3.) Also Code of Virginia. (Code of Va. of 1849, sec. 4.)

[2] The mere prior possession of property, however recent, will enable the occupant to recover or defend against a stranger, in ejectment, trespass, trover, &c.

A plaintiff in ejectment recovered on prior possession. Doe ex dem. Carr v. Billiard, 3 Mann. & Ryl. 111 ; Doe ex dem. Harding v. Cooke, 5 Moore & Payne, 181; Day v.

the parties, as where the relation of landlord and tenant has subsisted, or where the lessor claims as mortgagee, or where the defendant has

Alverson, 6 Wend. 223; Doe ex dem. Hughes v. Dyball, 3 Carr. & Payne, 610; a brief possession by the plaintiff's tenant; 1 Mood. & Malk. 346, S. C; Jackson ex dem. Weidman v. Hubble, 1 Cowen's Rep. 613; Jackson ex dem. Murray v. Hazen, 2 John. Rep. 22; Jackson ex dem. Duncan v. Harder, 4 John. Rep. 202; Allen ex dem. Harrison v. Rivington, 2 Saund. 111; Jackson ex dem. Murray v. Denn, 5 Cowen's Rep. 200; Catteries v. Cowper, 4 Taunt. 547; Smith ex dem. Teller v. Lorillard, 10 John. Rep. 338, 356.

The presumption derivable from possession is, that the possessor owns absolutely. Thus, possession, with permanency of the profits, or claim of title, is evidence, in respect to land, of a seisin in fee; but this may be rebutted or qualified by possession or other opposite evidence. Jane v. Price, 5 Taunt. 326; per Savage, C. J., in Livingston v. The Peru Iron Co., 9 Wend. 520, 1; People ex rel. Gault v. Van Nostrand, 9 Wend. 50, 53; People v. Leonard, 11 John. Rep. 504, 510; Day v. Alverson, 9 Wend. 223; Ricard v. Williams, 7 Wheat. 59; Jackson ex dem. Sparkman v. Porter, 1 Paine's Rep. C. C. U. S. 457.

It was agreed that the defendant might defend in ejectment on a prior possession. Doe ex dem. Burroughs v. Reade, 8 East, 353, 356; Gilliland's Lessee v. Hana, Addis, 251.

When the plaintiff makes title as assignee of a lease, it is necessary for him to prove the execution of the lease and assignment. Swearingen v. Hawkenberry, Wright's Rep. 111.

To warrant one's being made a lessor in ejectment, he must have a subsisting claim to a title or interest in the premises. Jackson v. Paul, 2 Cow. 502.

A lessor in ejectment ought to have a subsisting title or interest in the premises. Jackson ex dem. Starr v. Richmond, 4 J. R. 483; Jackson ex dem. Livingston v. Sclover, 10 J. R. 368.

If a person out of possession of land held adversely, convey the same to another, the title still continues in the grantor, and he may maintain ejectment. Williams v. Jackson ex dem. Tibbits, in error, 5 J. R. 489; Jackson ex dem. Youngs v. Vredenburgh, 1 J. R. 159.

And where, in an action of ejectment, several demises were laid, one from the grantor and another from the grantee of such deed, it was held, that the plaintiff might recover, though he could not on the demise of the grantee only. Williams v. Jackson ex dem. Tibbits, in error, 5 J. R. 489.

A recovery in ejectment does not prejudice the right of the defendant, and he may bring his action and recover, according to the interest which he had before the recovery against him. Jackson ex dem. Wright v. Dieffendorff, 3 J. R. 269.

So where the defendant in ejectment, having been thirty-eight years in undisturbed possession, suffered a judgment by default, and was turned out of possession; held, that he might, notwithstanding, recover the premises on the strength of his previous possession. Ib.

A legal estate must prevail against an equitable title which is doubtful. Jackson v. Sisson, 2 J. C. 321.

It is only in case of a resulting trust that the estate of a *cestui que trust* can be set up to bar a recovery by the person holding the legal estate. In such case, the trust may be proved by parol, and the estate of the *cestui que trust* may be sold on execution, and has been so far considered the property of the *cestui que trust* as to be a defence in an action of ejectment. Foote v. Colvin, 3 J. R. 216; 16 Ib. 199.

And it has been said in one case that the *cestui que trust* is the real owner. Jackson v. Matsdorf, 11 J. R. 97.

So, also, where money was sent by the defendant to purchase lands of the surveyor general, and the deed was taken in the name of Ketchum; in an action by the latter to

been admitted into possession, pending a treaty for the purchase or the like,(a) proof of title is not required;[1] but instead thereof,

(a) Ante, 75.

recover possession, it was held, that the defendant was the real owner, and entitled to retain the possession against the trustee. Jackson ex dem. Ketchum v. Townsend, 7 Wend. 379.

The above is an exception to the rule; for in a court of law the legal estate must prevail. Jackson v. Leggett, 7 Wen. 377.

An equitable lien or mortgage cannot be set up at law as a legal estate to defeat a recovery in an action of ejectment. Jackson ex dem. Lowell v. Parkhurst, 4 Wend. 369; 1 J. C. 114; 12 J. R. 418.

An equitable title cannot be set up in an action of ejectment against the legal title. The party must resort to a court of equity to protect him in his possession, where he has such equitable title. In error. Sinclair v. Jackson, 8 Cow. 543.

Where there are two demises in an action of ejectment, one in the name of the grantor, and the other in the name of the grantee, and at the time of the conveyance to the grantee, the premises are held adversely, so as to render the conveyance inoperative, the recovery may be in the name of the grantor. Jackson v. Leggett, 7 Wen. 377.

And a lessor in ejectment cannot defeat a recovery in his name by a conveyance after suit brought. Ib.

Land not included in the lines described in the declaration cannot be recovered in ejectment. Troxler v. Gibson, 1 Hayw. Rep. 465.

It is enough to show a decree ordering a conveyance, without showing the previous proceedings. But the decree must have been duly enrolled. Grebbin v. Davis, 2 A. K. Marsh. 16.

As to evidence of relinquishment, see Cox v. Cromwell, 3 Binn. 114; Jackson v. Newton, 18 Johns. 355.

Tenant may show his landlord's title at an end, in ejectment brought against him by the landlord; but where ejectment was brought by the reversioner, whose interest was the same as that of the tenant for life, and the tenant had paid rent to the reversioner: held, that he could not show that the reversioner's interest was at an end; but he might show some prior title in the person under whom he claimed to hold. Doe ex dem. Colemere et al. v. Whitroe, Dow. & Ryl. N. P. Cases, 1.

[1] An acknowledgment by a person, under whom the defendant in ejectment claims to hold the land, that he went into possession under the lessors of the plaintiff, is conclusive against the defendant, as to the tenancy. Jackson ex dem. Vandeusen et al. v. Scissam, 3 Johns. Rep. 499.

Though one purchase and take of a lessee, and in fact enter upon the premises under an absolute conveyance in fee, yet, in judgment of law, he enters as tenant to the lessor. Jackson ex dem. Van Schaick et al. v. Davis, 5 Cow. Rep. 123.

But this rule means the conventional relation of landlord and tenant, where some rent or return is in fact reserved to the former; not a relation arising from mere operation of law; as where one makes a grant, and by the omission of the technical words heirs, an estate for life only passes. In such case, after the death of the tenant for life, an adverse possession may commence running, in favor of those who enter and claim in fee under the grantee, which, after twenty-five years, will bar all claim of the reversioner and his heirs. Jackson ex dem. Webber et al. v. Harson et al., 7 Cow. Rep. 323

If the defendant have recognised the lessor as his landlord, he cannot, afterwards, dispute his title. Jackson ex dem. Low et al. v. Reynolds, 1 Caines' Rep. 444. Jackson ex dem.

the claimant should *prove the circumstances under which the [*276]
defendant, or those under whom he holds,(a) were admitted

(a) Barwick d. Mayor of Richmond *v.* Thompson, 7 T. R. 488.

Bleecker v. Whitford, 2 Caines' Rep. 215; Jackson ex dem. Van Alen et al. v. Vosburgh, 7 Johns. Rep. 186.

An agreement by a person in possession of land to abandon the premises at a certain day, is not a lease, and does not estop him from converting the title of the person with whom the agreement was made. Miller v. M'Brier, 14 Serg. & R. Rep. 382.

R. C. and others, being tenants in common of certain lands, and R. C. having sold a part thereof to E. W. and others, a decree for partition obtained by the other tenants against R. C., in a suit commenced subsequently to the sale, is not evidence in their favor in an action of ejectment brought by them against the vendees, who were no parties to the suit for partition. Carter's trustees v. Washington et al., 1 Hen. & Muf. Rep. 345.

Evidence of an agreement for a lease, between the lessor in ejectment and the tenant, is not sufficient to enable the plaintiff to recover the possession, when there is no proof that any lease was ever executed, or rent paid, and the tenant claims to hold adversely. Jackson ex dem. Southampton et ux. et al v. Cooley, 2 Johns. Cas. 253.

When the relation of landlord and tenant is once established, it attaches to all who may succeed to the possession, through or under the tenant, immediately or remotely. And the succeeding tenant is as much affected by the acts and acknowledgments of his predecessors, as though they were his own. Jackson ex dem. Van Schaick et al. v. Davis, 5 Cow. 123. Jackson ex dem. Webber et al. v. Harson, 7 Cow. Rep. 323.

He will not be permitted to show, that the land leased to him is without the bounds of the lessor's premises. Jackson ex dem. Bleecker v. Whitford, 1 Caines' Rep. 215. Same point, Brandt. ex dem. Cuyler v. Livermoore, 10 Johns. Rep. 358.

A tenant, who had been in possession under an adverse title, made application to the lessor of the plaintiff to purchase the land, and requested to be considered as his tenant; held, that although this precluded the tenant from taking advantage of the statute of limitations, yet he might show that the application was founded in mistake, or that the fee existed in himself or out of the lessor, but he cannot set up want of notice to quit as a defence. Jackson ex dem. Viele et al v. Guerden, 2 Johns. Cas. 353.

If the defendant, having originally entered under a title from A., afterwards takes a release from B., he cannot, in an action of ejectment against him by a person claiming under A., deny the title of A., and set up B.'s title as an older and a better one. Jackson ex dem. Bowne v. Hinman, 10 Johns. Rep. 292.

As between the landlord and tenant, the title of the former to the property leased, is not to be called in question.. William's Ex'rs. v. The Mayor, &c. of Annapolis, 6 Harr. & Johns. Rep. 533.

A lease unfairly obtained from a party in possession of the land, will not prevent the lessee from contesting the title of the lessor. Brown v. Dysinger et al., 1 Rawle's Rep. 408.

The defendants in ejectment cannot give in evidence a record of a suit against a third person, on which the land was sold, to one under whom he claims, unless some color of title be first shown in the person as whose property the land was sold. Kennedy v. Bogart et al. 7 Serg. & R. Rep. 97.

When a complainant derives title under a deed conveying the whole tract patented, except parcels thereof, before conveyed to persons named, it is incumbent upon him, where the defendant claims adversely to the patent, to show that the land in contest is not embraced in the exceptions. Guthrie v. Lewis' Devisees, 1 Monroe's Rep. 143.

into possession, and that their right to the possession had ceased:[1] together also, when the privity is not between the immediate parties to the action, with the derivative title of the claimant from the party, by whom the defendant was originally admitted into possession.(*a*) In these cases the defendant will not be permitted *to rebut this evidence, by showing that the title of the claimant was originally defective and insufficient, for it would be contrary to good faith to permit a party to controvert the title of him, by whom he has obtained possession;(*b*)[2]

(*a*) Doe d. Biddle *v.* Abrahams, 1 Stark. 305; Rennie *v.* Robinson, 1 Bing. 147.

(*b*) Sullivan *v.* Stradling, 2 Wils. 208; Driver d. Oxenden *v.* Lawrence, Blk. 1259; Parker *v.* Manning, 7 T. R. 537; Hodson *v.* Sharpe, 10 East, 355; Doe d. Prichett *v.* Mitchell, 1 B. & B. 11.

Otherwise, where the defendant claims to hold under the same grantor, more especially if he claims an accepted parcel. Ib. 143, 144.

A tenant holding over, after a lease expired, cannot controvert his landlord's title. Jackson ex dem. Wills et al. v. Stiles, 1 Cow. Rep. 575.

Nor, if he take a lease from a third person, on being ejected, will that third person be allowed to defend as landlord. Ib.

The latter claiming under the tenant has no greater right to a defence than the tenant would be entitled to. Ib.

Defendant inclosed a small piece of waste land by the side of a public highway, and occupied it for thirty years without paying any rent; at the expiration of that time, the owner of the adjoining land demanded sixpence rent, which defendant paid on three several occasions. In ejectment: held, that this, in the absence of other evidence, was conclusive to show that the occupation of defendant began by permission, and entitled the plaintiff to a verdict. Doe ex dem. Jackson v. Wilkinson, 3 Barn. &. Cress. Rep. 413.

A tenant may impeach his landlord's title whenever he can show that he was induced to take a lease by misrepresentation and fraud. Miller v. M'Brier, Serg. & R. Rep. 382.

A clear subsisting title outstanding in another, means such a title as a stranger could recover on in ejectment against either of the contending parties. Hall v. Gittings, Jr.'s lessee, 2 Har. & Johns. Rep. 122.

A plaintiff in ejectment can never recover, unless he show in himself a right of entry; therefore, it is competent to the defendant to show that the land is covered by an older patent, because that disproves the plaintiff's right of entry. Botts v. Shield's heirs, 3 Litt. Rep. 35.

Acceptance of a lease for a small part of land does not estop the defendant in ejectment from controverting the plaintiff's title to the residue of the tract. Pedrick v. Searle, 5 Serg. & R. Rep. 236.

[1] A person purchasing land under an execution is substituted in the place of the defendant; and, in ejectment by the landlord, cannot set up a title in a third person. Jackson ex dem. Klein v. Graham, 3 Caines' Rep. 188.

Neither can the defendant set up a title in a third person against the purchaser. Ib.

In ejectment by a purchaser under a *fi. fa.* against a person in possession, under the debtor, without title, or collusively, the defendant cannot set up an outstanding title in a third person. Jackson ex dem. Masters v. Bush, 10 Johns. Rep. 223.

[2] Where a person in possession of land, enters into a contract for the purchase of it

but he is allowed, notwithstanding, to prove the nature of such title, and to show, that although originally a valid one, it expired before the commencement of the action, and that the land then belonged to another, for such a defence is not inconsistent with the terms of the original possession.(*a*)[1]

(*a*) England d. Syburn *v.* Slade, 4 T. R. 682; Doe d. Jackson *v.* Ramsbottom, 3 M. & S. 516; Doe d. Lowdon *v.* Watson, 2 Star. 230; Baker *v.* Mellish, 10 Ves. jun. 544; Gravenor *v.* Woodhouse, 1 Bing. 38; Phillips *v.* Pearse, 5 B. & C. 433.

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such act is a recognition of the vendor's title, and precluded the purchaser from denying it; and, in case of forfeiture he is a mere tenant at will, and not entitled to notice to quit; and, on failure to make payments according to the terms of the contract, an action of ejectment lies to recover the possession. Whiteside et al. v. Jackson, 1 Wen. Rep. 418; Jackson v. Moncrief, 5 Wen. 26.

One making a contract to buy land, and taking possession under it, though strictly, the relation of landlord and tenant is not thus created; yet, the vendee, in ejectment by the vendor against him, is absolutely estopped from either showing title in himself, or setting up an outstanding title in another. Jackson ex dem. Livingston v. Walker, 7 Cow. Rep. 637; Jackson ex dem. Norris et al. v. Smith, Ib. 717.

Unless the contract were usurious, then, it seems, the tenant is not estopped. Ib. 717.

Or, "unless he was in some way deceived or imposed upon in making such agreement." Jackson ex dem. Brown et al. v. Ayres, 14 Johns. Rep. 224.

So, of any one coming in under him, either with his consent or as an intruder. Jackson ex dem. Livingston v. Walker, 7 Cow. Rep. 637.

And, where a third person, G., brought an ejectment against such a vendee, who went into another state, leaving his wife and children in possession of the premises; and G. then persuaded the wife to surrender the possession to him for a compensation, and afterwards put a tenant of his into possession, it was held, on an ejectment brought by the vendor against G.'s tenant, that such tenant was estopped from showing G.'s title or any title outstanding against the lessor. Ib.

A defendant in ejectment, claiming the land by executory contract of purchase from the plaintiff, will not be permitted to contest the plaintiff's title; and, consequently, will not be permitted to give evidence of the existence of outstanding elder grants covering the same land. Hamilton v. Taylor, Litt. Sel. Cas. 444.

The acknowledgment of the defendant that he entered under such contract with the plaintiff, may be proved without producing the contract. Ib.

A person who has entered into possession under another, and acknowledged his title, cannot set up an outstanding title in a third person. Jackson ex dem. Smith et al. v. Stewart, 6 Johns. Rep. 34. Same point. Jackson ex dem. Davie v. De Walts, 7 Johns. Rep. 157.

A lessor, whose property has been assigned to a provisional assignee, under the insolvent debtor's act, cannot eject an occupier of lands which passed under the assignment, although the provisional assignee has never taken possession, nor any permanent assignee been appointed, nor the rent ever been withheld from the lessor. Best, C. J., *dissentiente.* Doe ex dem. Palmer v. Andrews, 4 Bingh. Rep. 348.

[1] "Although a tenant cannot deny the title of his landlord under which he entered, it is competent for him to show that it has terminated either by its original limitation, or by conveyance, or by the judgment and operation of law. Jackson ex dem. Van Schaick et al. *v.* Davis, 5 Cow. Rep. 135. (Per SUTHERLAND, J., delivering the opinion of the court.)

In considering this subject, we shall notice, firstly, the evidence applicable generally to actions of ejectment; and secondly, the proofs requisite in support of each particular title; subdividing this second branch into two parts, namely, the proofs requisite when no privity exists between the parties, and those required where such privity does

Though the rule that the tenant is estopped to deny the title of his landlord, is an universal one, not merely technical, but founded in public convenience and sound policy; and though the person once a tenant, will, *prima facie*, be deemed to continue in that character, so long as he remains in the occupation of the land demised; yet it is competent for such person to show, that the relation has been dissolved; and this being done, he will be permitted to controvert the title under which he formerly held. Camp *v.* Camp et al., 5 Conn. Rep. 291.

A defendant in ejectment who has paid rent to the lessor of the plaintiff, may show that his landlord, pending the term, sold his interest in the premises. Doe ex dem. Lowden *v.* Watson, 2 Stark. Rep. 204, 228.

Where a man claiming under an executory contract is evicted and turned out of possession by a writ of *habere facias possessionem* on an adversary claim, he may purchase in such adversary claim, and assert it in defence of a suit brought by the man from whom he first purchased. Chiles *v.* Bridges' Heirs, Litt. Sel. Cas. 420.

In such case, the record of the suit by which he was evicted, and the sheriff's return of his dispossession, are evidence of these facts, although the person from whom he purchased was no party to the suit. Ibid.

Nor will the circumstances of judgment having been obtained by default, prejudice the defendant if it shall appear that the adversary claimant had the eldest patent, and that the land in question was included in it. Ibid.

Whether there be a tenancy or not, is matter of fact, and the tenant may produce parol evidence to disprove the existence of it. Jackson ex dem. Van Alen et al. *v.* Vosburgh, 7 Johns. Rep. 186.

In an action of ejectment the court has no power to compel the defendant to consent to a survey of the premises in his possession. Jackson ex dem. Van Rensselaer et al. *v.* Hogaboom, 9 Johns. Rep. 83.

Where the plaintiff and the defendant claim under adjoining patents, the court cannot grant a rule ordering the lessors of the plaintiff to permit a survey to be taken of the boundary line; but if it appear necessary for the defence in the suit, that it should be ascertained, they will allow a rule to stay proceedings till the lessors consent to a survey, or the judge at the circuit may postpone the cause on the same principle. Jackson ex dem. Waggoner et al. *v.* Murphy, 3 Caines' Rep. 82.

An agreement admitting the defendant in ejectment to be in possession of the land in controversy, does not preclude the plaintiff from showing how the defendant got into possession. Ruggles *v.* Gails, 2 Rawle's Rep. 232.

The parol declarations of one in possession of lands, as to the nature and extent of his interest, no legal title being shown in him, are admissible against him as evidence, and against those who claim under him, unless it appear that there is higher testimony as to the matter sought to be shown by parol. Jackson ex dem. Swartwout et ux *v.* Cole, 4 Cow. Rep. 587.

In ejectment a witness may be asked whether one was in possession of a tract of land, but not whether in possession of a particular part, or of a house, unless located in the plots filed in the cause. Hawkins' Lessee *v.* Middleton et al., 2 Har. & M'Hen. Rep. 119.

exist; and in the latter branch, giving an epitome of those cases in which the parties originally let into possession, with the privity of the claimant or those whom he represents, have, and have not, been estopped from rebutting such claimant's title.

Nice questions have formerly arisen as to the competency of witnesses, having some real or imaginary interest in the event of the trial, to give evidence in this action, but these subtilties are terminated by stat. 6 & 7 Vict. c. 85, s. 1, which enacts, that no person shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence on any trial, with a special proviso that such privilege shall not extend "to any lessor of the plaintiff or tenant of the premises *sought to be recovered in ejectment;" and these parties are therefore of course, now, the only persons not competent as witnesses.[1]

Where the ejectment is brought on several demises, and the evidence shows that the title is exclusively in one of the lessors, the other cannot be compelled to be examined as a witness for the defendant, as

[1] Where it did not appear how long the defendant in an action of ejectment had been in possession of the lands in dispute, a lessee of the plaintiff, under an old lease, who had probably been out of possession twenty years or more, and against whom no suit had been brought, was held, in the absence of other evidence, to presume liability for *mesne profits*, not to be incompetent as a witness for the plaintiff, on the ground of interest. Unger v. Wiggins, 1 Rawle's Rep. 331.

The grantor, in a quit claim deed, is a competent witness for the grantee, in ejectment brought by the latter for the land conveyed. Jackson ex dem. Weidman v. Hubble, 1 Cow. Rep. 613.

In ejectment, one who has delivered possession of the premises in question to the defendant, upon his parol agreement to purchase, cannot be a witness for him. Jackson ex dem. Roosevelt et al. v. Stackhouse, 1 Cow. Rep. 122.

The grantee of land, by a quit claim deed, is a competent witness in an action of ejectment between other persons, to establish such deed. Kline v. Bebee, 6 Conn. Rep. 495.

In ejectment, the defendant's son is not a competent witness to prove that he, and not his father, is tenant in possession. Doe ex dem. Jones et al. v. Wilds, 1 Marshall's Rep., [Eng. Com. Pl.] S. C., 5 Taunt. Rep. 183, (Acc. Doe ex dem. Lewis et al. v. Bingham, 4 Barn. & Ald. Rep. 677.)

A trustee, in a deed of trust, conveying property to be sold for payment of a debt, is equally the agent of the debtor and the creditor, and a competent witness in an action of ejectment against the debtor in behalf of a purchaser from himself, (to whom he has made a deed with a warranty against himself and his heirs only,) to prove that the sale of the property was advertised according to the terms of the deed of trust. Ross v. Norvell, 3 Munf. Rep. 170.

The lessor of the plaintiff, sworn as a witness, at the circuit, without objection, in order to prove the loss of a deed. Jackson ex dem. Swartwout et ux. v. Johnson, 5 Cow. Rep. 75.

all the lessors are jointly liable for the costs.(*a*) But a joint defendant, who has suffered judgment by default, is a good witness to prove the other defendant in possession.(*b*)

The title proved must not be inconsistent with the demise in the declaration. When therefore several lessors declare upon a joint demise, proof of a joint interest in the whole premises must be given. But, if a demise is laid by each of several lessors separately, they will be entitled to recover, whether they have a joint or several interest; for a several demise severs a joint tenancy.(*c*) And in a case where a joint demise was laid by seven trustees of a charity, who were appointed at different times, and the tenant had paid one entire rent to the common clerk of the trustees, it was held that such payment of rent should enure in the most beneficial way for the trustees in [*278] support of their title as brought forward by themselves, *unless the defendant expressly proved them to be entitled in a different manner. And it was considered that the circumstance of their being appointed at different times was not sufficient evidence for that purpose.(*d*)

The locality of the premises, as described in the declaration, must be proved;(*e*) but after the plaintiff has established his *title to a verdict, the court will not try the extent of his claim, as defined by particular metes and bounds.(*g*)

Proof is not now, in any case, necessary of an actual entry on the premises. Since the statute for the abolition of Fines and Recoveries,(*h*) and the provision in the tenth section of the statute 3 & 4 Wm. 4, c. 27, which enacts, that no person shall be deemed to have been in possession of premises, merely by making an entry thereon, the only two cases in which an actual entry was requisite, namely, where a fine with proclamations had been levied, and where the entry was necessary in order to preclude the operation of the Statute of Limitations, have ceased to exist.

(*a*) Fenn d. Pewtress *v.* Granger, 3 Campb. 178.
(*b*) Doe d. Harrop *v.* Green, 4 Esp. 198; ante, 221.
(*c*) Doe d. Marsack *v.* Read, 12 East, 57.
(*d*) Doe d. Clarke *v.* Grant, 12 East, 221.
(*e*) Ante, 173–175; *vide* Doe d. Gunson *v.* Welsh, 4 Camp. 264.
(*g*) Doe *v.* Drapers' Company *v.* Wilson, 2 Stark. 477.
(*h*) 3 & 4 Wm. 4, c. 74.

It has already been observed, that the common consent rule dispenses, in all cases, with proof of entry and ouster by the defendant.(*a*)

Notwithstanding the terms of the consent rule, it was formerly holden necessary to prove the defendant in possession of the premises in dispute,(*b*) and plaintiffs were frequently non-suited on subtile points arising out of this practice, quite independent of *the merits of the case.(*c*)[1] But by orders of the different courts, the consent rule is now altered, so as to include the confession of possession, as well as of lease, entry, and ouster;(*d*) and no proof of possession is now required, unless there should be some dispute as to the identity of the premises, when the consent rule must be produced;(*e*) but it does not satisfactorily appear from the last reported case, on which party the production rests.(*g*) As, however, it ought *in all cases to be annexed to the record, it is probable that the onus of the production will be thrown upon the plaintiff. [*277]

(*a*) 3 & 4 Wm. 4, c. 74,

(*b*) Goodright d. Balsh *v.* Rich, 7 T. R. 327; Fenn d. Blanchard *v.* Wood, 1 B. & P. 573.

(*c*) Doe d. James *v.* Stanton, 2 B. & A. 371; Doe d. Giles *v.* Warwick, 5 M. & S. 393; Doe *v.* Stradling, 2 Stark. 187.

(*d*) Ante, 223.

(*e*) Ante, 225.

(*g*) Doe d. Greaves *v.* Raby, 2 B. & Ad. 948; 1 M. & M. 237.

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[1] The plaintiff is entitled to recover in ejectment, although it appear that the defendant who is in possession, is the mere servant of another, by whose permission he entered into possession. Doe dem. Cuff v. Stradling, 2 Starkie's Rep. 187.

In an action of ejectment, to which the general issue is pleaded, it must appear that the defendant dispossessed the plaintiff, or was in the actual possession of the land. Cooper v. Smith, 9 Serg. & R. Rep. 26.

The return of the sheriff, under the act of assembly of April the 13th, [Pennsylvania,] is only *prima facie* evidence of the possession of any defendant, whether his name be in the writ of ejectment, or be added by the sheriff; and such defendant may rebut it by showing that he was not in possession. Ib.

The return of "served" by the sheriff, on a writ of ejectment, is *prima facie* evidence of possession by the defendants, whether they be originally named in the writ or added by the sheriff. Dietrick v. Mateer, 10 Serg. & R. Rep. 151.

A plaintiff in ejectment cannot succeed, unless he prove the defendant to be in possession. Pope v. Pendergast, 1 Marsh. Rep. (Ky.) 122; Eastin v. Rucker, 1 Marsh. Rep., (New Series.) 236; Cooley v. Penfield, 1 Verm. 244; Stevens v. Griffith, 8 Verm. Rep. 448.

Yet, where one procures himself to be made defendant, the plaintiff is not bound to prove him in possession; and if such a voluntary defendant is proved not to be in possession, the plaintiff is, notwithstanding, entitled to a verdict. Gorhan v. Brenon, 2 Doe's Rep. 174.

The acts of occupiers during their occupation are, even after their occupation has ceased, evidence against the parties under whom they came into possession.(*a*) And where E., an occupier, attorned tenant to L. by an instrument reciting that he was tenant, and that L., claimed the fee and had entered taking possession; the instrument was held to be evidence of L.'s ownership at the time of the attornment, against future occupiers, although such occupiers did not claim through E.(*b*)

The declarations of deceased occupiers are also admissible in evidence for many important purposes. Thus, a declaration by a deceased occupier, that he held the premises of A. B., is *prima facie* evidence of the seisin of A. B.;(*c*) a memorandum signed by a deceased owner of a copyhold tenement, who occupied a slip of garden adjoining, stating that no part of the garden ground belonged to the copyhold, but that he paid rent for the whole of it, is evidence to show that the garden ground formed no part of the copyhold tenement;(*d*) a deed executed by a deceased party whilst in possession, charging the land with an annuity, in which he states S. to be the legal owner, is evidence for S.(*e*) Declarations of deceased occupiers are also admissible, for the purpose of proving that any particular lands formed part of the estate they occupied;(*g*) and statements of deceased occupiers touching their title, are admissible in evidence generally, without reference to the particular effect they may produce in the cause.(*h*)

*In order to enable claimants to read in evidence the depositions given by deceased witnesses on previous trials, the parties to the two actions, and the title to the premises in dispute must be identical, but the premises themselves may be different. Thus, in a case where A., being seised of two closes, conveyed one to B., and both A. and B. were ousted by C., and both recovered possession against him, and B. was a second time dispossessed by C., B. was not allowed, in a second ejectment against C., to prove a deposition made by a witness, since

(*a*) Doe d. Manton *v.* Austen, 9 Bing. 41.

(*b*) Doe d. Lindsey *v.* Edwards, 5 Ad. & Ell. 95.

(*c*) Peaceable d. Uncle *v.* Watson, 4 Taunt. 16; S. P. Doe d. Majoribanks *v.* Green, Gow. 227.

(*d*) Doe d. Bagalley *v.* Jones, 1 Camp. 367.

(*e*) Doe d. Daniel *v.* Coulthred, 7 Ad. & Ell. 235.

(*g*) Davies *v.* Pierce, 2 T. R. 53; Outram *v.* Morewood, 5 T. R. 121; *et vide*, Ivat *v.* Finch 1 Taunt. 141.

(*h*) Carne *v.* Nicoll, 1 Bing. N. C., 430.

deceased, upon the trial of the former ejectment between A. and C., and the defendant had, in consequence, a verdict. But upon a subsequent ejectment between the same parties, in which a count was inserted laying a demise in A., the deposition was admitted in evidence under that demise, although the action was for a different property, the parties and the question in both actions being the same, viz., who was the heir at law of E. F.(*a*)

If a claimant in ejectment introduce what passed at a former trial respecting the same premises, to which trial neither he, nor any one claiming under him was a party, but in which the now defendant was then claimant, and obtained a verdict, for the purpose of showing such verdict to have been obtained by improper evidence—it will be competent for the defendant to give evidence of what deceased witnesses proved at the trial, for the purpose of showing that the then verdict was a correct one.(*b*)

*Assessments of commissioners of the land tax, by which it appears that at a certain time property was assessed in a *family surname only*, are evidence to show, in connection with other facts, that at such time the property was occupied by a particular individual of the family.(*c*)

The advantages incident upon the privilege of the general reply, and also upon the right of making the first address to the jury, frequently cause admissions to be made by the defendant's counsel for the purpose of obtaining them, and this practice has given rise to some decisions upon the subject, which it will be useful here to notice.

When the lessor claims as heir and proves his pedigree and stops, and the defendant sets up a new case, which is controverted by evidence on the part of the plaintiff, the defendant is entitled to the gene-

(*a*) Doe d. Foster *v.* Earl of Derby, 1 Ad. & Ell. 783. The two actions first brought by A. and B. against C., were tried at the same assizes. After the verdict had passed for A. in the action against B, the counsel for C. submitted to a verdict in the second action, and one point raised was, whether it was agreed at the time that the evidence given in the first cause should be considered as repeated in the second, because if so, the deposition would clearly be evidence. The court ruled that no inference was to be drawn of such an agreement from the mere fact of the consent to the verdict, and that the party relying on such agreement must show it either by the Judge's notes, or other distinct proof.

(*b*) Doe d. Lloyd *v.* Passingham, 2 C. & P. 440.

(*c*) Doe d. Strode *v.* Leaton, 2 Ad. & Ell. 171.

ral reply.(*a*) But if the defendant's case is met by a new case on the part of the plaintiff, as for example, if the plaintiff originally claims as heir, and the defendant establishes a will, and the plaintiff sets up another will, the general reply rests with the plaintiff.(*b*)

If, after the pleadings are opened, the defendant's counsel expresses himself ready to admit the lessor's *whole case*, as for example, if the lessor claims as heir-at-law, and he undertakes to admit the pedigree, and that the ancestor died seised, or if he claims as devisee, and the defendant admits the will, and claims under a disputed codicil, it will entitle him to open the case, and also to the general reply, if witnesses are afterwards called on the part of the claimant.(*c*) But a *partial admission will not be sufficient, as for example, where the real question was the legitimacy of the defendant, who was clearly heir, if legitimate, a proposition to admit that, unless the defendant was legitimate the claimant was heir-at-law was insufficient.(*d*) So also, where the question was the competency of the ancestor to execute a deed of conveyance, a proposal to admit the heirship, and that the ancestor died seised, unless the same was defeated by a conveyance made by him to the defendant, was considered insufficient.(*e*) But in a case where the lessor claimed as heir-at-law of S. R., who was the heir-at-law of J. C., and took possession of the property at the time of the death of J. C., and continued in possession until his own death, and the defendant undertook to admit the seisin of J. C. and the heirship of the claimant, but proposed to defeat his title, by setting up a will of J. C., he was permitted to begin, Lord Denman, C. J., observing, "Here the defendant admits all the plaintiff requires to entitle him to a verdict, except the single fact of the descent to S. R., that he proposes to defeat by a will which he will have to prove, and on that will is the single issue in the cause."(*g*) And in a case where the real question in dispute was the validity of a will, and the defendant undertook to admit the heirship of the claimant, but who contended that he was not bound to accept such admission, because he claimed part of the property as assignee of

(*a*) Goodtitle d. Revett *v.* Braham, 4 T. R. 497.

(*b*) Doe d. Goslee *v.* Goslee, 6 C. & P. 46.

(*c*) Doe d. Corbett *v.* Corbett, 3 Camp. 368; Doe d. Pill *v.* Wilson, 1 M. & R. 323; Fenn d. Wright *v.* Johnson, Nottingham Sum. Ass. 1813, MS., and S. C, Nottingham Lent Assizes, 1814.

(*d*) Doe d. Warren *v.* Bray, 1 M. & M. 166.

(*e*) Doe d. Tucker *v.* Tucker, 1 M. & M. 536.

(*g*) Doe d. Wollaston *v.* Barnes, 1 M. & Rob. 386.

an outstanding term independent of the will, it was held, notwithstanding, that the defendant was entitled to begin.(*a*)

*Let us now consider the proofs to be adduced by a claimant in ejectment, when his title to the lands can be controverted; that is to say, when no privity exists between the parties.[1] [*281]

(*a*) Doe d. Smith *v.* Smart, 1 M. & Rob. 476.

[1] In an ejectment by A. for the use of the heirs of B., a deposition taken in a former ejectment by B. against the same defendants, for the same land, but in which the plaintiff claimed under a different title, cannot be read in evidence. Cluggage et al. v. Lessee of Duncan, 1 Serg. & R. Rep. 111.

In special verdict in ejectment, or on a writ of right, if the ancestors of a party be stated to have been successively seised and possessed, from 1669 to 1730, and no interruption be found, the maxim "that what appears not, is to be taken as not having existed," fixes such seisin and possession to have been interrupted. Birch v. Alexander, 1 Wash. Rep. 34, 37.

When an act for vesting certain lands of D. C. in C. C., referred to a location and enumeration of the lands of D. C. made, &c., and delivered to the commissioners of forfeitures, and directed them to be appraised by such persons as the commissioners of forfeitures should appoint, and the appraised value to be paid either to the commissioners, or treasurer, &c., ; as against the state, the location and enumeration thus adopted by the act, are conclusive that the lands mentioned in them belonged to D. C. Jackson ex dem. Swartwout v. Cole, 4 Cow. Rep. 587.

An exemplification of a copy of the certificate of the appraisers, filed in the treasurer's office, having an indorsement by the treasurer upon it, that the original had been delivered to C. C., deceased, and it being shown that it could not be found among the papers of C C., was held admissible evidence, though it was the exemplified copy of a copy. Ib.

This copy, having been furnished to the treasurer by the commissioners of forfeitures for his information, and as his guide, under the act of vesting the land in C. C., may be regarded as an original, for some purposes, and especially as against the state, the treasurer having indorsed upon it all he did under it. Ib.

Where a state officer, *e. g.* the treasurer, does an act which would be a violation of his duty, unless certain terms or conditions had first been performed by an individual, as between the state and the individual, such performance shall be deemed, *prima facie*, to have taken place. Ib.

A. died seised of lands, leaving three sons, B., C., and D. In ejectment by the heirs of B., against E., who claimed to hold under D., E. offered in evidence the will of A., dated 1757, by which he devised his real estate to his three sons and their heirs, in equal proportions; but it being objected that the will was void, on account of the insanity of the testator, E. waived the production of the will and relied on a parol partition of the testator's estate, between the three sons, made in 1786, a previous holding by them as tenants in common, and the separate possession under the partition of D., continued from that time; held, that, though when a tenancy in common is admitted, a parol partition, followed by possession under it, will be valid; yet, when the whole right or title of the party setting up the tenancy in common, and parol partition is denied, a parol partition, and possession under it, will not be sufficient to transfer the title; that, by waiving the will of A., the title was

*And first, when he claims by descent, as heir of the person last seised.

When the party claims by descent, he must prove that the ancestor from whom he derives his title, was the person last seised of the lands in fee simple,(*a*) and that he, the claimant, is his heir.

This seisin of the ancestor may be proved by showing, that he was either in the actual possession of the premises, at the time of his death, or in the receipt of rent from the ter-tenant; for possession is presumptive evidence of a seisin in fee, until the contrary be shown.(*b*) [*282] But if it is probable that the *defendant will rebut this presumption, the lessor should be prepared with other proofs of his ancestor's title.

In order to show the heirship of the claimant, he must prove his descent from the person last seised, when he claims as lineal heir, or the descent of himself and the person last seised from some common ancestor, or at least from two brothers or sisters,(*c*) if he claims colla-

(*a*) Co. Litt. 11(*b*); Jenkins d. Harris *v.* Pritchard, 2 Wils. 45.
(*b*) B. N. P. 103.
(*c*) Roe d. Thorne *v.* Lord, 2 Blk. 1099.

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to be considered in B., as heir at law, and could not be divested by parol. Jackson ex dem. Van Beuren et al. v. Vosburgh, 8 Johns. Rep. 270.

Though, after a possession by D. for so long a time, a tenancy in common might have been presumed; yet, by offering the will of A., and waiving it, the door was shut against the presumption of any other source of title. Ib.

Where, in ejectment, the defendant gave evidence to show that certain lands of D. C., under whom the lessor of the plaintiff claimed title, were forfeited by an act of attainder: held, that this was *prima facie* evidence that the title to the premises in question was once in D. C., and that the plaintiff might, without further proof of the title in D. C., proceed to deduce a title from him. Jackson ex dem. Swartwout et ux. v. Cole, 4 Cow. Rep. 587.

If a naked power to sell be given to executors, the land, in the meantime, descends to the heir, and an ejectment may be brought for it in his name. Brown v. Dysinger et al., 1 Rawles' Rep. 408.

On the death of a person, intestate, leaving no widow nor lawful issue, but a father, and brothers and sisters, the remainder, in fee, vests in the brothers and sisters, under the sixth section of the act of 19th April, 1794, at the same instant that the life estate passes to the father. M'Comb v. Dillo, 5 Serg. & R. Rep. 304.

Therefore, a person who has married one of the sisters, cannot be a witness in favor of the father, in an ejectment for land that descended from such intestate, though he has released all his interest in possession, remainder, or reversion in his own right, or the right of his wife. Ib.

terally; together with the extinction of all those lines of descent which would claim before him. This is done by proving the marriages, births, and deaths, necessary to complete his title, and showing the identity of the several parties. Thus, supposing A., the claimant, and B., the person last seised, to be cousins, descended from a common ancestor C., B. being the only child of D., the elder son of C., and A. the only child of E., the younger son of C. In this case A. must prove the marriage of C., the birth and marriage of D., the birth, marriage, and death of E., the birth and death without issue of B.,(*a*) and his own birth;(*b*) for it is a *maxim of law, that he who asserts the death of another, who was once living, must prove his death, whether the affirmative issue be that he be dead or living.(*c*)

The testimony of persons present when the events happened, or who knew the parties concerned at those periods, and the production of extracts from parish registers, are the most satisfactory modes of *proving facts of this nature; and when the claimant is the [*283] lineal descendant of the person last seised, but little difficulty can arise in procuring the necessary proofs. But when he claims as collateral heir, and it is necessary to trace the relationship between him and the person last seised through many descents to a common ancestor, difficulties often intervene, from the remoteness of the period to which the inquiries must be directed, which, upon the ordinary rules of evidence, would be insuperable. To remedy this evil, the courts, from the necessity of the case, have relaxed those rules in inquiries of this nature; and allow hearsay and reputation (which latter is the hearsay of those, who may be supposed to have known the fact, handed down from one to another) to be admitted as evidence in cases of pedigree.(*d*)

Thus, the declarations of deceased members of the family, whether relations or connections by marriage,(*e*) are admissible evidence to prove relationship; as who a person's grandfather was, or whom he married, or how many children he had, or as to the time of a marriage, or of the birth of a child, and the like. So, likewise, the declarations

(*a*) Richards *v.* Richards, 15 East, 294, n.
(*b*) 2 Blk. Comm. 208, &c.
(*c*) Wilson *v.* Hodges, 2 East, 312.
(*d*) Higham *v.* Ridgway, 10 East, 120.
(*e*) B. N. P. 294; Vowels *v.* Young, 13 Ves. 148; Doe d. Northey *v.* Harvey, 1 R. & M. 297; Doe d. Futter *v.* Randall, 2 M. & P. 20.

of deceased persons, as to the fact and time of their own marriages, and whether their children were born before or after marriage, are admissible;(*a*) *though such declarations cannot be received to bas-
[*284] tardize their children born in *wedlock.(*b*) Where, likewise, a cancelled will of a deceased ancestor was found amongst the papers of the person last seised, it was allowed to be read in evidence as a paper relating to the family; the place in which it was found being considered as amounting to its recognition, by the party last seised, as the declaration of his ancestor concerning the state of his family.(*c*)

The reputation of a family may also afford presumptive evidence of the death of a person without issue.(*d*)

But hearsay evidence is not admissible to prove the *place* of any particular birth; for that is a question of locality only, and does not fall within the principle of the rules applicable to cases of pedigree;(*e*) nor are the declarations of deceased neighbors, or of the intimate acquaintances, or servants of the family, evidence on questions of this nature;(*g*) nor do the declarations of an illegitimate member of a family fall within the rule;(*h*) nor is the hearsay of a relative to be admitted when the relative himself can be produced.(*i*) It is also necessary, in order to entitle the declarations of a deceased relative to be admitted, that they should be made under circumstances, when the relation may be supposed without an interest, and without a bias;
[*285] and, therefore, *if they are made on a subject in dispute after the commencement of a suit, or after a controversy preparatory to one, they ought not to be †received, on account of the probability that they were partially drawn from the deceased, or perhaps intended by him to serve one of the contending parties.(*k*)

(*a*) Goodright d. Stevens *v.* Moss, Cowp. 591; May *v.* May, B. N. P. 112.

(*b*) Rex *v.* Luffe, 8 East, 193.

(*c*) Doe d. Johnson *v.* Lord Pembroke, 11 East, 505.

(*d*) Doe d. Banning *v.* Griffin, 15 East, 293; Doe d. Oldham *v.* Wolley, 8 B. & C. 22.

(*e*) Rex *v.* Inhabitants of Erith, 8 East, 542.

(*g*) Vowels *v.* Young, 13 Ves. 147, 514; Rex v. Inhabitants of Eriswell, 3 T. R. 707, 723; Weeks *v.* Sparke, 1 M. & S. 688; Johnson *v.* Lawson, 2 Bing. 90; *et vide*, 14 East, 330.

(*h*) Doe d. Bamford *v.* Barton, 2 M. & R. 28.

(*i*) Pendrell *v.* Pendrell, Stran. 294; Harrison *v.* Blades, 3 Campb. 457.

(*k*) The case of the Berkeley Peerage, 4 Campb. 401.

The presumption of the continuance of human life ends in general at the expiration of seven years, from the time when the person was last known to be living;(*a*) but such death may, under particular circumstances, be presumed in a shorter time: as where a party sailed in a vessel which was never afterwards heard of.(*b*) Proof also of the fact that a tenant for life has not been seen or heard of for fourteen years, by a person residing near the estate, although not a member of the family, is *prima facie* evidence of his death.(*c*) There is, however, no legal presumption as to the exact time of a party's death, who has not been heard of for seven years; and if the fact of his being alive or dead at any particular period during the seven years is important, it must be proved by the party relying on it.(*d*)

Reputation has been held good evidence of a marriage, in an ejectment brought by an heir, though his parents (whose marriage was the subject in dispute) were both living.(*e*)

It need scarcely be stated, that in all cases where the declaration of parties, if deceased, would be admissible in evidence, the parties themselves may *be called as witnesses, while living. [*286]

Entries in family Bibles and other books may likewise be received in evidence in questions of pedigree.(*g*) So *also recitals in family deeds, monumental inscriptions, engravings on rings, old pedigrees hung up in a family mansion, and the like.(*h*)

The original visitation books of heralds, compiled when progresses were solemnly and regularly made into every part of the kingdom to inquire into the state of families, and to register such marriages and descents as were verified to them on oath, are also allowed to be good evidence of pedigrees;(*i*) but a recital in an act of Parliament, stating I. S. to be heir-at-law to a particular person, has been held not to be evidence.(*k*)

(*a*) 19 Car. II. c. 6, s. 1; Doe d. George *v.* Jesson, 6 East, 80; Roe *v.* Hasland, Blk. 404.
(*b*) Watson *v.* King, 1 Stark. 121.
(*c*) Doe d. Lloyd *v.* Deakin, 4 B. & A. 433.
(*d*) Doe d. Knight *v.* Nepean, 5 B. & Ad. 86.
(*e*) Doe d. Fleming *v.* Fleming, 4 Bing. 266.
(*g*) Whitlocke *v.* Baker, 13 Vez. 514.
(*h*) Vowels *v.* Young, 13 Vez. 148.
(*i*) 2 S. N. P. 772.
(*k*) Anon., 12 Mod. 384; *et vide*, B. N. P. 112.

When the lessor claims as heir to copyhold premises, he must, in addition to the foregoing evidence, produce the rolls of the manor, which show a surrender to him, or to those under whom he claims; but it is not necessary that he should prove his own admittance, unless the ejectment be against the lord.(*a*) If, however, the ejectment is against the lord, he must either show that he is admitted, or
[*287] that he has tendered *himself to be admitted and been refused; but it is not necessary to tender himself to be admitted at the lord's court, if the steward, upon application out of court, has refused to admit him.(*b*)

When he claims as *customary heir*, he must, after proving his pedigree, show that he is heir strictly within the custom, for every custom which departs from the common law is construed strictly; and if the custom be silent, the common law must regulate the descent.(*c*) Thus, where the custom is that the eldest *sister* shall inherit, the eldest *aunt*, or *niece*, is not within it.(*d*) So also, if the custom be that the youngest *son* shall inherit, it will not extend to the youngest *nephew*.(*e*)

The usual method of proving these several customs, is by means of the different admissions of the customary heirs upon the court rolls of the manor, produced by the steward upon oath; or by the medium of verified examined copies. But if the ancient court rolls should be lost, or there should be no instance of an admission upon them, similar to the custom set up by the lessor, an entry upon the rolls, stating the mode of descent of lands in the manor, will be admissible evidence, as to the existence of the custom.(*g*) Where, however, the lessor claimed as youngest nephew, and produced, as the only evidence to
[*288] support *his title, an admission upon the court rolls of the youngest nephew, as customary heir, at a court-leet and baron held in 1657; and for the defendant it appeared upon the same rules, that at a court-leet and baron held in 1692, the jury and homage found, that the custom of descent extended only to the youngest son, and if

(*a*) Rumney *v.* Eves, 1 Leon. 100; Holdfast d. Woollams *v.* Clapham, 1 T. R. 600; Doe d. Tarrant *v.* Hellier, 3 T. R. 162; *ante*, 46.

(*b*) Doe d. Burrell *v.* Bellamy, 2 M. & S. 87; *ante*, 46.

(*c*) Co. Copy. 43.

(*d*) Radcliff *v.* Chaplin, 4 Leon. 242.

(*e*) 1 Roll. 624.

(*g*) Roe d. Bebee *v.* Parker, 5 T. R. 26; Denn d. Goodwin *v.* Spray, 1 T. R. 466.

no son, to the youngest brother, and no farther, (which entry was corroborated by two old witnesses, who testified, that they had heard and believed that the custom went no farther;) upon a verdict being found for the lessor of the plaintiff, the court refused to set it aside.(*a*)

Secondly, of the proofs when the lessor claims as devisee.

When the lessor claims as the devisee of a freehold *interest at [*289] common law, or of a customary freehold where there is no *custom to surrender to the use of the will,(*b*) he must prove the seisin of his devisor;(*c*)[1] and if the devise under which he claims, be of a remain-

(*a*) Doe d. Mason *v.* Mason, 3 Wils. 63.
(*b*) Hussey *v.* Grills, Amb. 299.
(*c*) Ante, 239.

[1] A devise of the testator's estate, generally, passes both real and personal estate, and may include a debt and mortgage. Jackson ex dem. Livingston v. Delancey, 11 Johns. Rep. 365.

No technical words are necessary to devise a fee, and the intention of the testator, to be collected from the whole will, is to govern. Jackson ex dem. Herrick v. Babcock, 12 Johns. Rep. 389.

The testator devised as follows: "I give to my wife, after payment of debts, &c., all my estate, real and personal, that I may be in possession of at my decease, to be at her absolute disposal, according to an agreement made and entered into with her, on the 27th October, 1802, and previous to our marriage; it being my intention, if my said wife should die before me, that my real and personal estate shall be divided among my said children, their heirs and assigns." Held, that the wife took an estate in fee, not by implication, but by force of the words "all my estate to be at her absolute disposal;" that as, by reference to the agreement in writing mentioned in the will, it appeared that it was intended, that after the death of one, the other should have the full benefit of survivorship in the joint estate created by that agreement, it showed the intention of the testator to dispose of the fee; and the use of the word heirs in the devise to the children did not show an intention in the testator to limit the preceding devise to his wife, to her life only. Ib.

A will has no effect or operation, until the death of the testator, who, in the mean time, may revoke it in whole or in part. Matter of Nan Mickel, 14 Johns. Rep. 324.

The words of a will were, "my property, after my debts are paid, I leave to my beloved wife, A., and wish her to educate my two daughters, J. and G., with care, and to treat them with kindness and affection," without any personal bequest except a ring to a third person, or other words to explain or control them; held, that the real and personal estate of the testator passed to the wife in fee. Jackson ex dem. Pearson *v.* Housel, 17 Johns. Rep. 281.

Where a testator, being seised in fee of several estates in the parish of C., partly paternal, and the remainder purchased at different times, devised the whole (consisting of nineteen messuages and eighteen acres of land) to his wife, in fee, and afterwards levied a fine "of twelve messuages, twelve gardens, twenty acres of land, twenty acres of meadow, twenty acres of pasture, five acres of wood, and five acres of land covered with water," and died

der, or a reversion in fee, or the like, he must prove the determination of all the precedent estates. He must also, in case the will be dated

suddenly without re-executing his will: held, in ejectment by the heir at law, for the paternal estate, (on the ground that the fine operated as a revocation of the will,) that parol evidence was admissible to restrain the operation of the fine to one of the purchased estates on which were twelve messuages, so as not to pass the estate in question. Den ex dem. Bulkley *v.* Wilford, 8 Dowl. & Ryl. Rep. 549.

A right of entry in land is devisable, within the statute of wills, (1 R. L. New York, 364,) though, at the time of the devise and of the devisor's death, the land be in the actual possession of another who claims and holds it adversely. Jackson ex dem. Eden et al. v. Varick et al., 7 Cow. Rep. 238. Affirmed on error, 2 Wen. Rep. 166. *Et vide* Waring *v.* Jackson ex dem. Eden et al., (in error,) 1 Peters' Rep. (Sup. Court, U. S.) 571; where the same point is decided.

Contra, Smith ex dem. Roosevelt *v.* Vandeusen, 15 Johns. Rep. 343.

As to what may be disposed of by will, generally, see Waterman's Am. Ch. Dig. vol. 3, tit. Will, p. 548, *et seq.*

Et vide Revised Statutes of New York, part 2, chap, 6, tit. 1, secs. 1, 2, 3.

The words used in the statute of wills (of Kentucky) "of possession, reversion or remainder," are to be construed as descriptive of the nature of the estate to be devised, and not the particular situation thereof: an entry or patent is devisable, nor will the intrusion of a stranger affect the power to devise it. May's Heirs and Devisees v. Slaughter, 3 Marsh. Rep. (Ky.) 508.

G., being seised of two tracts of land, called C. & W., of which W. was the eldest tract, devised C. to F; and, by a subsequent clause in his will, directed that W. should be sold for the payment of his debts. Under this direction W. was sold to M. The lines of the two tracts conflicted; and in an action of ejectment brought by the devisee of C., (the junior tract,) against M., to recover that part of C. which was included within the limits of W., (the elder tract,) held, that the plaintiff was not entitled to recover. That the true construction of the devise of C. was, that the devisee thereof took only so much of that tract as was not covered by the lines of W., the elder tract. Benson's Lessee v. Musseter, 7 Harr. & Johns. Rep. 208.

In an action of ejectment, where the defendant's title to the land sued for, and his only defence, was under a supposed will of a former owner, and it appeared that there had been a former action of ejectment against the defendant, in which the same question was in issue, and in which the said supposed will was adjudged to be invalid, and the case on that ground decided against him: held, that he was not thereby concluded from going into evidence to establish the legality of the will. Edelen *v.* Hardy's Lessee, 7 Harr. & Johns. Rep. 61.

If it be proved, on a trial in ejectment, that the father of the lessor of the plaintiff, who devised the land to him, was in possession thereof many years before until his death, and that the lessor of the plaintiff afterwards conveyed it to a person who was in possession at the time of his death; the jury may presume that the lessor of the plaintiff was in possession from the death of his father to the date of the conveyance, if it be not proved that some other person in the mean time had the possession. Moore v. Gilliam, 5 Munf. Rep. 346.

The sanity of a testator is presumed until the contrary appears; and the *onus probandi*, as to his mental incapacity, lies on the party who alleges his insanity. Jackson ex dem. Van Dusen v. Van Dusen, 5 Johns. 144.

But if a mental derangement has been proved, it is then incumbent on the devisee to show a lucid interval, or the sanity of the testator at the time of executing the will. Ib.

subsequently to December 31, 1837, prove its due execution pursuant to the provisions of the statute, 7 Wm. IV., and 1 Vict. c. 26, s. 9; but

Parol evidence to show that the testator executed a will under duress, may be received; but not of the declarations of the testator himself as to that point. Jackson ex dem. Coe v. Kniffen, 2 Johns. Rep. 31.

An alteration made in a will, whether material or immaterial, by a person claiming under it, renders it void. Jackson ex dem. Malin v. Malin, 15 Johns. Rep. 293.

But whether a material alteration by a stranger, without the privity of the party claiming under it, has the same effect. *Quære;* Ib.

A testatrix devised as follows: "I give, &c., to my daughter, E. R., all my property in W., in the State of Connecticut, all the land deeded to me by B., excepting 1000 acres of land, I deed to R. M." &c. It was alledged, that the word *also*, had been erased between the words "Connecticut," and "all," after the execution of the will, so as to give R. M. not only the 1000 acres, but the land out of which they were excepted: held, that the alteration, if any, was immaterial, and it did not vitiate the will, for whether the word *also* was inserted or not, the legal construction and effect of the will was the same, the land deeded to the testatrix by B., excepting the 1000 acres she had deeded to R. M., was devised to E. R. Ib.

The record of a will, proved under the statute, (sess. 24, c. 9, s. 6, 1 N. R. L. 365,) is not conclusive upon the heir, so as to prevent the admission of evidence to impeach the validity. Jackson ex dem. Woodhull v. Rumsey, 3 Johns. Cas. 234.

The record of a will, like that of a deed, is only *prima facie* evidence of its authenticity. Ib.

The fact of a rasure in a deed, may be proved by any other person than the subscribing witness. Penny v. Carwithe, 18 Johns. Rep. 499.

Where a power was given by will, to several executors to sell, one of whom renounced, and another articled to convey, and received the purchase money, and the vendee took possession, evidence of the prior and subsequent declarations of the acting executors, approving and ratifying the sale, is admissible, and such circumstances establish a parol title, upon which the vendee may recover in ejectment. Taylor v. Adams, 2 Serg. & R. Rep. 534.

A recital in a will, is an estoppel to parties claiming under the will. Dean v. Cornell, 3 Johns. Cas. 174.

So, where A., by his last will and testament, among other things, devised as follows: And whereas I have conveyed to my son C. my lands at C., and to my son D. my lands at F., I give and devise all my remaining lands and tenements, and real estate whatsoever, to my sons C. and D., and my daughter, &c.; held, that the recital in the will was evidence of the conveyance of the farm in F. to D., and that C., as heir of the testator, was estopped, by the recital, to deny that the farm was conveyed to D.; and that the necessary intendment, from the language of the clause in the will, was, that it was a conveyance in fee to D. Ib.

The circumstance that a writing exhibited for probate, as a last will and testament, was wholly written by the testator himself, is *prima facie* evidence that he was in his senses, and able to make a will at the time of writing the same; so that the *onus probandi* to repel that presumption, lies on those who wish to impugn it. Temple & Taylor v. Temple, 1 Hen. & Munf. Rep. 476.

In such case, proof that the testator's intellects were much impaired by the use of opium and ardent spirits, and that in consequence thereof, he was frequently incapable of business, is not sufficient to repel the presumption, without proof, that such was his condition at the time when the writing was executed. Ib.

Grammatical inaccuracies, want of knowledge of points of law, or omission of a part of the testator's property, are circumstances not sufficient to vitiate a will. Ib.

as that act repeals the stat. 29 Car. II. c. 3, sec. 5, which previously regulated the devises of freehold interests, and makes no new provisions respecting wills of a prior date, it would seem that such wills do not require any particular solemnities to make them valid.(*a*)

A considerable diversity formerly prevailed as to the solemnities required in the execution of wills, with regard to devises of freehold land, and to bequests of personalty.[1] By the stat. 29 Car. II.

(*a*) Doe d. Smith *v.* Smith, Peake, Evid. 456.

A testator's bequeathing (among other things,) an article of property which does not belong to him, is, at most, only a circumstance from which to infer a state of mind unfavorable to the making of a testament; and ought not to prevail against positive testimony, showing his competency to make a will at the time in question. Marks et ux v. Bryant et ux., 4 Hen. & Munf. Rep. 91.

An issue will be directed to try whether a will alleged to be lost, was ever in fact made, and what were its provisions. Brent v. Dold, Gilm. Rep. 211.

A will conveying real estate, was wholly written by another, and signed by that other, with the name of the testator: There were two subscribing witnesses to this paper, one of whom saw the signature and heard the testator acknowledge that it was signed by his authority; the other does not say whether the paper was signed or not at the time of his attestation, the testator merely declaring, "it is my will." It was held, that such a paper was not proved according to the requisitions of the statute. Burwell et al. v. Corbin et al., 1 Rand. Rep. 131.

A decree of the orphans court on the question of a probate of a will is not evidence against the validity of the instrument as a will of real estate in an action of ejectment. Den v. Ayres, 1 Green's Rep. 153.

[1] The New York Revised Statutes, part 2, chap. 6, tit. 1, §§ 1, 2, 3, 4, 5, 6, 33, 34, 35, 36, 37, 42 and 45, contain the following provisions relative to wills.

Sec. 1. "All persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate, by a last will and testament, duly executed according to the provisions of this title.

Sec. 2. "Every estate and interest in real property descendible to heirs, may be so devised.

Sec. 3. "Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by the statute, to take by devise.

Sec. 4. "Every devise of any interest in real property, to a person who, at the time of the death of the testator, shall be an alien, not authorized by statute to hold real estate, shall be void. The interest so devised, shall descend to the heirs of the testator; if there be no such heirs competent to take, it shall pass under his will to the residuary devisees therein named, if any there be, competent to take such interest.

Sec. 5. "Every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate, which he was entitled to devise, at the time of his death.

Sec. 6. "If by any will, any real estate be charged with any debt, and the creditor whose

c. 3, s. 5, *it was required that all devises of freehold interests should be in writing, "signed by the party so devising [*290]

debt is so charged, shall attest the execution thereof, such creditor, notwithstanding such charge, shall be admitted as a competent witness to prove the execution of such will.

Sec. 33. "Every last will and testament of real or personal property, or both, shall be executed and attested to in the following manner:

"1. It shall be subscribed by the testator at the end of the will:

"2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses:

"3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament:

"4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.

Sec. 34. "The witnesses to any will, shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions, shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who will sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid, be excused or incapacitated on that account, from testifying respecting the execution of such will.

Sec. 35. "No will in writing, except in cases hereinafter mentioned, nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

Sec. 36. "If after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation, shall be received.

Sec. 37. "A will executed by an unmarried woman, shall be deemed revoked by her subsequent marriage.

Sec. 42. "When a testator shall have a child born after the making of his will, either in his lifetime or after his death, and shall die, leaving such child, so after born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in his will, every such child shall succeed to the same portion of the father's real and personal estate, as would have descended or been distributed to such child, if the father had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to, and out of the parts devised and bequeathed to them, by such will.

Sec. 45. "Whenever any estate, real or personal, shall be devised or bequeathed to a

the same, or by some other person in his presence, and by his express direction, and attested and subscribed in the presence of the devisor, by three or four credible witnesses," whilst bequests of personalty were regulated by the authority of the ecclesiastical courts upon looser and widely different maxims. By the tenth section of the stat. 7 Wm. IV., and 1 Vict. c. 26, (repealing the 29 Car. II. c. 3, s. 5,) it is enacted, that *no will* (with the exception of soldiers' or mariners' wills,) made after the 31st day of December, 1837, "shall be valid, unless it shall be in writing, and executed in manner hereinafter mentioned, that is to say, it shall be singed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest *and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

There is, therefore, now no difference in the solemnities requisite for the validity of wills as regards the nature of the property disposed of by them. But the same diversity exists as heretofore in the mode of proof, according to the nature of the property in dispute. The Ecclesiastical courts have no jurisdiction over wills with regard to freehold interests; and, whenever a freehold is claimed, the original will must be produced, or proof given of its loss, and secondary evidence given of its contents as in the case of other documents, by examined copies, or parol testimony. And such is the jealousy of the common law with regard to ecclesiastical jurisdiction, that neither an exemplification under the great seal,(*a*) nor the probate under the seal of the Ecclesiastical Court,(*b*) will be admitted as secondary evidence; though it seems that the register book, or ledger-book, in which the will is set out at length, is in such case admissible; whilst on the contrary when

(*a*) Comber, 40.

(*b*) Doe d. Ash *v.* Calvert, 2 Camp. 389; *et vide*, Doe d. Wild *v.* Ormerod, 2 M. & R. 466.

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child or other descendant of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate."

And see Rev. Sts. of Mass. tit. 3, ch. 62; Rev. Sts. of Maine, tit. 7, ch. 92; Rev. Sts. of Vermont, tit. 14, ch. 48; Rev. Sts. of Mich. tit. 16, ch. 68; Code of Ver., tit. 33, ch. 122; Rev. Sts. of Wis., tit. 18, ch. 66; Hartley's Dig. of Laws of Texas, Art. 3252, *et seq.*

a chattel interest is in dispute, the common and ordinary proof is the production of the probate, or, if that should be lost, the exemplification.(*a*)

The reported cases upon different points which have arisen respecting the due execution of a will under stat. 29 Car. II. c. 3, s. 5, are very numerous, and it will be necessary to review them carefully, for the purpose of ascertaining what portion of them are applicable to the provisions of the statute which has superseded it.

The difference between the statutory enactments are as follows. Firstly, the statute 29 Car. II. only required that the *will should be signed by the party or some other person in his presence and by his authority: the statute 7 Wm. IV. and 1 Vict., furthermore provides, that such signing "shall be at the foot or end thereof."[1] This proviso puts an end to the distinctions which have arisen as to implied signatures, and the places and number of signatures;(*b*) and it would seem also to have settled in the negative the question of the effect of sealing only.(*c*) *Secondly, it is now necessary that [*291] the signature should be made or acknowledged by the testator in the presence of the witnesses. Neither of these circumstances were formerly requisite. No acknowledgment of the signature was necessary, and it was sufficient if the testator acknowledged in the presence of any one of the witnesses that the instrument was his will.(*d*) Thirdly, the witnesses must now all be present when the will is signed, or the signature acknowledged by the testator, whereas formerly an acknowledgment in the presence of one witness only either of the signature or the nature of the instrument, provided the other witnesses signed the paper, although at other times, at the testator's request, was sufficient.(*e*) Fourthly, two witnesses only are now required instead

(*a*) St. Leger *v.* Adams, 1 Ld. Raym. 731; Anon., Skin. 174.

(*b*) Lemayne *v.* Stanley, 3 Lev. 1; Right d. Cator *v.* Price, Doug. 241.

(*c*) Lemayne *v.* Stanley, 3 Lev. 1; Lee *v.* Libb, 1 Show. 69; S. C., Carth. 35; Warneford *v.* Warneford, Stran. 764; Smith *v.* Evans, 1 Wils. 313; Ellis *v.* Smith, 1 Ves. jun. 11; S. C., 1 Dick. 225; Baker *v.* Denning, 8 Ad. & Ell. 94.

(*d*) Grayson *v.* Atkinson, 2 Ves. 454; Ellis *v.* Smith, 1 Ves. jun. 11; S. C., 1 Dick. 225; Trymner *v.* Jackson, cited 1 Ves. 487, recog. 2 Ves. 258; Stonehouse *v.* Evelyn, 3 P. Wms. 252; Peate *v.* Ougley, Comyn. 197.

(*e*) White *v.* Trustees of British Museum, 6 Bing. 310; Wright *v.* Wright, 7 Bing. 457.

[1] By the Revised Statutes of New York, "It shall be subscribed by the testator at the end of the will." *Vide* part 2, ch. 6, tit. 1, sec. 33.

of three.[1] And, fifthly, although it is re-enacted, that the witnesses "shall attest and subscribe the will in the presence of the testator," it

[1] Two witnesses are sufficient in New York. *Vide* Revised Statutes, part 2, ch. 6, tit. 1, sec. 33. So also in Ohio, Indiana, Illinois, Kentucky, Tennessee, Missouri, Delaware, Virginia, North Carolina, and Kentucky. It seems that three witnesses are required in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, South Carolina, Georgia, Alabama, and Mississippi.

Wills to pass land must be executed and authenticated according to the laws of the country where the land lies. Robertson v. Barbour, 6 Monroe, 527.

Proof of the execution of a will made in a Spanish province, according to the laws of that country, not conformable to the laws of Virginia, is not sufficient to pass lands then situate in Virginia. Ib.

An attestation of a will of lands made in the same room with the testator, is *prima facie* an attestation in his presence, according to the statute of wills: an attestation not made in the same room, is *prima facie* not an attestation in his presence; but, as in the one sense the attestation is good, if shown to have been made within the scope of the testator's view from his actual position, so, in the other, it is not good, if it appear that in the actual relative situation of the testator and witnesses, he could not possibly have seen the act of attestation, nor have so changed his situation as to have enabled him to see it, without aid of others, which was at hand, but was neither asked nor given. Neil v. Neil, 1 Leigh, 6.

A decedent leaves a will conveying real estate, wholly written by another, and signed by that other with the name of the testator. There are two subscribing witnesses to this paper, one of whom saw the signature, and heard the testator acknowledge that it was signed by his authority; the other does not say whether the paper was signed or not at the time of his attestation, the testator merely declaring, "it is my will;" it was held, that such a paper was not proved according to the requisitions of the statute. Burwell v. Corbin, 1 Randolph, 131.

A will executed in the presence of two subscribing witnesses is not such an execution, under the statute, as will pass real estate, although the penner of the will was present at the execution; and a codicil, executed in the presence of two subscribing witnesses, one of whom was different from the two witnesses to the will, does not give effect to the will as to the real estate. Dunlap v. Dunlap, 4 Desau. 305.

Testator emancipates slaves by will written all with his own hand, be proved to be so by two witnesses, and recorded; but the will is not sealed, nor attested by two subscribing witnesses: held, this will is duly executed and proved, to emancipate slaves. Dunn v. Arney, 1 Leigh, 465.

A mistake in the date of a will, as where it was dated after the death of the testator, may be corrected by the court. Susan v. Ladd, 6 Dana, 30.

A will wholly written and signed by the testator, is valid without any subscribing witness. Baker v. Dobyns et al., 4 Dana, 220.

A will witnessed by three persons may be established by two of them, proving a compliance with the legal requisites of attestation and execution. Deakins v. Hollis, 7 Gill & Johns. 311.

A testator may limit the extent of power conferred by him, and prescribe the particular manner of executing it, and the agent is as little able to vary the manner as to transcend the limit. Mackay et al. and Moore, ex'r., Dudley's Rep. 94.

The witness to a will need not see the testator sign. It is sufficient if he acknowledge

is also expressly enacted, "that no form of attestation shall be necessary," which removes the doubts that have existed as to imperfect attestations.

the instrument, even where the name has been written by another, at his request, and in his presence. Rash v. Purnell, 2 Harr. Rep. 448.

It is not sufficient that witnesses subscribe their names to a will as witnesses; they must also attest the signature or acknowledgment of the will by the testator. Griffith's ex'r. v. Griffith, 5 B. Mon. Rep. 511. [*Vide* Powell on Dev., vol. 1st, from 43 to 91, and 642, and notes and authorities cited.]

A will, to be attested in the presence of the testator, must be witnessed within his view. It is not necessary to prove that he actually saw the witnesses attest the will. It is sufficient if, from their relative position, he could see them. Hill v. Barge, 12 Ala. Rep. 687.

The provision of the New York revised statutes, requiring wills to be executed in the presence of two witnesses, does not apply to a will of personal property executed out of the state, by a person domiciled where such will was executed, and who continued to reside there until his death. Neither does it apply to wills of personal estate made before the revised statutes went into effect, although the testator was domiciled in the state of New York at the time he died. A will of personal property made out of the state of New York, by a person who was not a citizen of that state, cannot be admitted to probate by the court of chancery of New York, unless it was duly executed according to the laws of the state or county where it was made; although the testator was domiciled in the state of New York at the time of his death. In the Matter of Robert's Will, 8 Paige, 446.

It is necessary that the attesting witnesses should see the testator, or some one for him, sign the instrument which they are called upon to witness; or that the testator should either say or do something, in their presence and hearing, indicating that he intends to recognize such instrument or paper as one which has been thus signed by him, and upon which his name appears, as a valid will; or as having been signed by his authority, for the purposes therein expressed. Jauncey v. Thorne, 2 Barb. Ch. Rep. 40.

But it is not necessary that the testator should, in express terms, declare that his name, signed to the will, was so signed by his authority and direction, and in his presence. Ib.

In the state of New York the production of the will, with his name subscribed to it, and in such a way that the signature can be seen by the testator and by the attesting witnesses, and the request of the testator that they should witness the execution of the instrument by him, or as his will, would of itself be a sufficient acknowledgment of his signature to render the will valid under the provisions of the act of March 5th, 1813, concerning wills. Ib.

The most liberal presumptions in favor of the due execution of wills, are sanctioned by courts of justice, where, from lapse of time, or otherwise, it might be impossible to give any positive evidence on the subject. Ib.

Accordingly, a will may be sustained, even in opposition to the positive testimony of one or more of the subscribing witnesses, who, either mistakenly or corruptly, swear that the formalities required by the statute were not complied with, if, from other testimony in the case, the court or jury is satisfied that the contrary was the fact. Ib.

And where any of the witnesses are dead, or in such a situation that their testimony cannot be obtained, proof of their signatures is received, as secondary evidence of the facts to which they have attested, by subscribing the will as witnesses to the execution thereof. Ib.

Where the attestation clause of a will states that the will was signed, sealed and published, by the testator, as his last will and testament, in the presence of the attesting witnesses, who, at his request, and in his presence, subscribed their names as witnesses thereto, this, after a considerable lapse of time, and when it may reasonably be supposed that the particular circumstances attending the execution of the will, have escaped the recollection

*These positive enactments have removed many of the inconveniences resulting from the loose wording of the statute 29 Car. II. c. 3, s. 5;

of the attesting witnesses, is a circumstance from which the court or a jury may infer that these requisites of the statute were complied with. Nelson v. M'Giffert, 3 Barb. Ch. Rep. 158.

In the execution of wills, the statute does not require any particular form of words to be used by the testator, either in the admission of the signature, in the publication of the instrument as his will, or in the communication to the witnesses of his request or desire that they should subscribe their names to the will as attesting witnesses to the fact of its due execution by him. It is sufficient if the formalities required by the statute are complied with in substance. Vide 2 Barb. Sup. Court Rep. 385, S. P.

It is not necessary that the attesting witnesses to a will should subscribe it in the presence of each other. Dewey v. Dewey, 1 Met. Rep. 349.

It is sufficient *prima facie* evidence that the attesting witnesses to a will subscribed it in the presence of the testator, if he were so situated that he might have seen them subscribe it. Ib.

Where one of the attesting witnesses to a will has no recollection of having subscribed it, but testifies that the signature of his name thereto is genuine, the testimony of another attesting witness, that the first did subscribe his name in the testator's presence, is sufficient evidence of that fact. Ib.

A will subscribed by three witnesses, at the testator's request, and in his presence, he declaring it to be his will, is well attested, within the revised statutes of Massachusetts, (62, sec. 6,) although neither of the witnesses saw him sign it, or heard him acknowledge his signature thereto, and only one of them saw the testator's name thereon. Ib.

An attestation clause, showing, upon its face, that all the forms required by the statute have been complied with, is not absolutely necessary to the validity of a will; as the subscribing witnesses will be permitted to prove, that the forms were, in fact, complied with, although the attestation clause is silent on the subject. Chaffee and Chapman v. Baptist Missionary Convention, 10 Paige, 85.

And after the death of the subscribing witnesses, a compliance with any of the forms required by the statute, and not noticed in the attestation clause, may even be presumed from circumstances. Ib.

Although the attestation clause to a will states that all the formalities required by the statute, in the execution of the will, have been complied with, the fact may be disproved by the subscribing witnesses. Ib.

But a proper attestation clause, showing that all the statute formalities have been complied with, will, in the absence of proof to the contrary, be presumptive evidence of the facts, after the death of the subscribing witnesses, or where, from the lapse of time, the witnesses cannot recollect what took place at the execution of the will. Ib.

A proper attestation clause is also important to show that the person who prepared the will knew what formalties in its execution were required, and to raise the presumption that he gave to the testator the necessary information in relation thereto; or if he was present at the execution of the will, that he took care that such formalities were complied with. Ib.

In the state of New York, where a will was made, and the testator died previous to the revised statutes, but the will was proved before the surrogate, after the first of January, 1830, and before the passage of the act of May, 1837, concerning the proof of wills, &c., Held, that the formalities requisite to the due execution of the will, were those which were required by the second section of the act of March 5th, 1813, concerning wills; but that the mode of

but the rules which relate to the subscription by the witnesses are still applicable.

proof must be that which was prescribed by the provisions of the revised statutes, which were in force when the will was propounded for probate. Jauncey v. Thorne, 2 Barb. Ch. Rep. 40.

In the state of New York, where the instrument propounded as a will, was wholly in the hand-writing of a third person, and was executed by the decedent merely by signing it and acknowledging it to be her hand and seal, in the presence of the subscribing witnesses, and the instrument was not read, nor was anything said at the time, from which the witnesses understood it to be a will; Held, that it was not duly executed and published by the testatrix, so as to make it a valid will, under the provisions of the revised statutes; although the attestation clause, which was not read by or in the hearing of the witnesses, stated the will to have been duly published in the presence of such witnesses. Brinckerhoof v. Remsen, 8 Paige, 488.

The New York revised statutes having provided that the testator, at the time of signing or acknowledging his will, in the presence of each of the witnesses thereto, shall declare the instrument so subscribed to be his last will and testament, there must be an actual publication of the instrument, as a will, in the presence of the subscribing parties, in addition to the other formalities required by the statute. Ib.

No particular form of words is necessary to be used by the testator in declaring the instrument signed by him to be his will, if he actually communicates to the attesting witnesses the information that he knows and understands the nature of the instrument he is executing, and intends distinctly to recognize it as his will. Ib.

But to render a will valid under the provisions of the New York revised statutes, the subscribing witnesses thereto must, at the time of its execution, know it to be a will; and must also know that the testator understands it to be, and means to execute it as a will. Ib.

Where the attestation clause is in the usual form, stating the will to have been executed and published by the testator as his last will and testament, in the presence of the witnesses, specifying that all the requisite formalities were complied with, if such attestation clause is read over in the presence and hearing of the testator and the witnesses, and understood by him and them, a request from testator that they will subscribe the same, as witnesses to his execution thereof, will of itself be a sufficient publication of the instrument as his last will and testament. Ib.

And where the subscribing witnesses to a will have subscribed their names as witnesses at the end of an attestation clause, showing that all the formalities requisite to a valid execution of the will were complied with, the mere inability of the witnesses to recollect that the testator published the instrument as his will, is not sufficient to invalidate the same, unless the witnesses recollect that he did not declare it to be his will, and that the attestation clause was not read and understood at the time of the execution of the instrument. Ib.

So in the case of the death of the subscribing witnesses to a will, their signatures at the end of the attestation clause stating, in the usual form, that all the formalities required by law were complied with, would, when duly proved, be sufficient evidence that the will was executed and published by the testator in due form. Ib.

It is proper that the whole attestation clause should, at the time of the execution of the will, be read over in the hearing of the witnesses, and of the testator. And where the testator is illiterate, it is also proper that the whole will should be deliberately read over to him, in the presence and hearing of the witnesses; and that the fact of such reading in his presence should be stated in the attestation clause; or, at least the witnesses should, by inquiries of such illiterate testator, ascertain the fact that he is aware of the contents of the instru-

It was not formerly necessary that the witnesses should subscribe at the same time; nor be informed of the nature of the instrument they were about to attest,(*a*) nor are either of these incidents now [*292] *necessary. The witnesses must be all present when the testator signs the will himself or acknowledges the signature, and the witnesses must also all sign in the testator's presence; but the statute does not require that the witnesses should sign at the same time, or in the presence of each other. But it is necessary that all the witnesses attest the *same instrument*, and that the instrument attested be that by which the lands are intended to pass. Therefore, where a testator devised his lands by a will, attested by two witnesses only, and about a year after made a codicil, and declared therein that the will should be ratified and confirmed in all things, except as altered by that writing, and that his codicils should be taken as part of his will; and executed this codicil in the presence of one of the former witnesses, and another person, neither the first will, nor the other witness to it,

(*a*) White *v.* Trustees of British Museum, 6 Bing. 310; Wright *v.* Wright, 7 Bing. 457; Keigwin *v.* Keigwin, 3 Curt. 607, *et vide* Warren *v.* Postlethwaite, 2 Collyer, 113, *in notis.*

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ment which he executes and publishes as his will, and that he is possessed of competent understanding to make a testamentary disposition of his property. The neglect, however, of these precautions, will not render the will invalid, if the court and jury before whom the question of its validity is tried, are satisfied, upon the whole evidence, that the will was duly executed, and that the testator understood its contents. Chaffee and Chapman v. Baptist Missionary Convention, 10 Paige, 85.

Where any of the formalities required by the statute, in the execution of a will, are not substantially complied with, the will is void. Ib.

The burden of proving the true execution of the will, lies upon the party seeking to establish it. But it may be proved by other evidence than that of the subscribing witnesses; or its due execution may be inferred from circumstances, where the subscribing witnesses are dead, absent, or otherwise incapacitated to give testimony, or where, from lapse of time or otherwise, they are unable to recollect whether the requisite formalities were observed when they witnessed the execution of the instrument. Ib.

The subscription of the will must be made by the testator in the presence of each of the attesting witnesses, or it must be acknowledged by him to have been so made, to each of the attesting witnesses. Ib.

Where the testator, at the time of the execution of his will, in presence of the attesting witnesses, placed his finger on his name subscribed at the end of the will, and acknowledged that it was his last will and testament, but there was no evidence that he subscribed it in the presence of the attesting witnesses, or that he acknowledged in their presence that such subscription was made by him, or by his direction or in his presence; held that the will was not duly executed. Ib.

The making of his mark at the end of the will, by the testator, is a sufficient signing of the will, to be a compliance with the requirement of the statute. Ib.

being present, it was holden to be an insufficient attestation.(*a*) And where a testator, by a will *not witnessed*, devised lands, and afterwards made a codicil, and taking the codicil in one hand, and the will in the other, said, "This is my will whereby I have settled my estate, and I publish this codicil as part thereof," the signature of the codicil, by the testator and three witnesses, was held insufficient to render *the will valid.(*b*) But if there be several instruments written by the testator upon one paper, and it plainly appear that his intention *was that all should form but one will, and not a will and [*293] codicil, in such case the execution of the last instrument will be considered as an execution of the whole.(*c*) So, also, if a will be written upon several sheets of paper, it will be valid, although the last sheet only be seen by the witnesses, provided it be regularly signed and attested, and every part of the will be present at the time of the execution; of which latter fact the presumption of law will be in favor, should the different sheets correspond.(*d*)

The subscription of the witnesses must still also be in the presence of the testator, but proof need not now, more than formerly, be given that the testator *actually did see* the witnesses subscribing; their attestation is sufficient if it appear that he *might see them*.(*e*) Thus, where the witnesses signed in a room adjoining to the one which contained the testator's bed, upon a table opposite the door of communication, it was holden to be sufficiently in the testator's presence.(*g*) So, also, where the testator executed his will in his *carriage, and the [*294] witnesses signed their names in a room hard by, the carriage being in such a situation as to enable the testator to see what was passing in the room, the will was held to be valid.(*h*) But if the testator could not possibly see the witnesses subscribe, as if they subscribe in another room, out of sight, although by the testator's express directions, the †execution will not be good: the design of the statute being to prevent a wrong paper from being intruded on the testator, in the place of

(*a*) Lee *v.* Libb, 3 Lev. 1; S. C., Carth. 35.

(*b*) Penphrase *v.* Ld. Lansdowne, *cited* Com. 334; Attorney General *v.* Barnes, Prec. Cha. 270.

(*c*) Carleton d. Griffin *v.* Griffin, Burr. 549; Doe d. Williams *v.* Evans, 1 C. & M. 12.

(*d*) Bond *v.* Seawell, Burr. 1773; S. C., Blk. 407; B. N. P. 264.

(*e*) Baker *v.* Denning, 9 Ad. & El. 95; Harrison *v.* Harrison, 8 Ves. 185; Addy *v.* Grix, ib. 504.

(*g*) Shires *v.* Glascock, Salk. 688; Davy *v.* Smith, 3 Salk. 395; Todd *v.* Earl of Winchelsea, 1 M & M. 12.

(*h*) Casson *v.* Dade, 1 Bro. C. C. 99.

the true one.(*a*) And upon this principle, if the testator, between the time of his own subscription, and the subscription of the witnesses, lose his mental powers, it will invalidate the will, although signed in his presence.(*b*)[1]

(*a*) Eccleston *v.* Petty, Carth. 79; Broderick *v.* Broderick, 1 P. Wms. 239; Machel *v.* Temple, 2 Show. 288; Doe d. Wright *v.* Manifold, 1 M. & S. 294.
(*b*) Right d. Cator *v.* Price, Doug. 241.

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[1] The Revised Statutes, (pt. 2, ch. 6, tit. 1, secs. 6, 50, 51,) contain the following regulations, as to witnesses to wills:

Sec. 6. "If, by any will, any real estate be charged with any debt, and the creditor, whose debt is so charged, shall attest the execution thereof, such creditor, notwithstanding such charge, shall be admitted as a competent witness to prove the execution of such will."

Sec. 50. "If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest, or appointment of any real or personal estate, shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, or appointment, shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made."

Sec. 51. "But, if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them."

A devise or legacy to a witness is absolutely void; so that a conveyance by the devisee to a third person is inoperative. Jackson ex dem. Denniston v. Denniston, 4 Johns. Rep. 311.

If either husband or wife be a witness to a will, containing a devise or legacy to the other, such devise or legacy is void, and the party is a competent witness to the will. Jackson ex dem. Cooder v. Woods, 1 Johns. Cas. 163; Jackson ex dem. Beach v. Durland, 2 Johns. Cas. 314.

A grantor, with covenant of warranty, is a competent witness for his grantee in an action of ejectment, brought by the grantee for the recovery of the possession of the premises conveyed; although he would not be a competent witness to support the title of his vendee in an action against him for the premises by a third person. Jackson ex dem. Montressor et al. v. Rice, 3 Wen Rep. 180.

One of the subscribing witnesses to a will, if he can prove all the solemnities required by the statute, is sufficient for the plaintiff; but if the witness called can only prove his own signature, other witnesses, if living, must be produced; or, if they are dead, their handwriting, and that of the testator, must be proved; and it is then a question of fact, whether, under all the circumstances, all the requisites of the statute have been complied with. Jackson ex dem. Le Grange v. Le Grange, 19 Johns. Rep. 386.

One of the subscribing witnesses to a will of lands, may prove its execution, on a trial at law. And this, although the will be lost, or not produced in court. Dan et al. v. Brown et al., 4 Cow. Rep. 483.

A mark is a sufficient signature to a will within the meaning of the statute, and an attestation by a mark has also been adjudged to be a

And, where a witness to a loss will prove its due attestation by three witnesses, but had forgotten the name of one of them, having no doubt, however, that he was a competent witness, this was holden sufficient. Ib.

Proof by a subscribing witness that he, with two others, saw executed, and that they witnessed a will of land which he had seen at the surrogate's office, which was identified with the one produced on the trial; though the witness was too dim of sight to see it at the trial; held sufficient proof of the will on a trial at law. Jackson ex dem. Henry v. Thompson, 6 Cow. Rep. 178.

One claiming, through deeds which recite a will, is estopped to question its genuineness. Ibid.

Where the witnesses to a will were all dead, and one of them had signed the initials of his name, as his mark, and the testator had also signed his mark, and the handwriting of two of the witnesses was proved; and a witness at the trial, in 1807, swore that he had seen the other witness make his mark, in the year 1760, to a paper in his possession, and that from a comparison of the two marks, and from the peculiar manner in which one of the initial letters was made, he believed the make affixed to the will was made by the witness to it; held, that this was sufficient evidence of the execution of the will to permit it to be read to the jury, when accompanied with evidence of a possession by the devisees under the will, and of the declarations of one of the other witnesses, in his lifetime, as to the due attestation by all the witnesses. Jackson ex dem. Van Dusen v. Van Dusen, 5 Johns. Rep. 144.

Where one of the witnesses to a will was called, and proved his own signature, and that of another subscribing witness, who was dead; but the witness had lost all recollection of the facts and circumstances of the execution of the will, and had no knowledge of the testator; held, that this was not sufficient proof of the execution of the will; but that the third subscribing witness, who was living, within the jurisdiction of the court, ought to be produced. Jackson ex dem. Le Grange v. Le Grange, 19 Johns. Rep. 386.

To prove the execution of a will, it is not enough to account for the absence of the three subscribing witnesses, and prove the handwriting of one only; but, under such circumstances, proof of the handwriting of all three of the witnesses, and that of the testator, would be proper to be left to the jury, from which to infer that the formalities required by the statute had been observed. Jackson ex dem. Hunt et al. v. Luquere, 5 Cow. Rep. 221.

If the witness to a deed be dead, proof of his handwriting is sufficient. Mott v. Doughty, 1 Johns. Cas. 230.

Handwriting may be proved by witnesses, from previous knowledge of the hand, derived either from having seen the person write, or from authentic papers received in the course of business. Titford v. Knox, 2 Johns. Cas. 211. Same point, Jackson ex dem. Van Dusen v. Van Dusen, 5 Johns. Rep. 144.

So, a person who had been accustomed to see the letters of the party, although he had never seen him write, may testify as to his belief that the handwriting is the party's, from the knowledge which he had acquired from the correspondence. Titford v. Knox, 2 Johns. Cas. 211.

A deed forty-four years old, to which there were two witnesses, was allowed to be read in evidence, on proof of the handwriting of one of the subscribing witnesses, and that he was dead, without any proof of the handwriting of the other witness, or that he was dead or absent, or could not be found, or that any inquiry had been made after him; but there were strong circumstances in the case to induce a presumption, that he could not be found, or was dead, or beyond sea. Jackson ex dem. Livingston v. Burton, 11 Johns. Rep. 64.

sufficient attestation; and it has been decided in the former case, that it is not necessary to prove that the party could not sign his name.(*a*)

Inconveniences have frequently arisen, and wills been rendered inoperative from the incompetency of one or more of the subscribing witnesses, and a provision for remedying these evils, although in some respects an imperfect one, was provided by statute 25 Geo. II. c. 6;(*b*) but that statute was repealed by 7 Wm. IV. and 1 Vict. c. 26, and it is by the 14th section of the latter statute, provided, "That if any person who shall attest the execution of a will, shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid." The effect of gifts by the will to an attesting witness is also provided for by the 15th section.

[*297] *The result of the foregoing inquiry seems to be, that in order to prove a will duly executed within the *statute 7 Wm. IV., and 1 Vict. c. 26, it must be signed by the testator himself, or by his express direction, at the foot or end thereof; that such signature must be made or acknowledged by him before two or more witnesses, then present together; that such witnesses must subscribe their names respectively in the presence of the testator, and that all the witnesses must sign the same instrument.

These facts must be proved by the subscribing witnesses, if they are alive and can be produced. But if one witness can prove the whole

(*a*) Todd d. Lord Winchelsea, 1 M. & M. 13; Longford *v.* Eyre, 1 P. Wms. 740.
(*b*) Bettison *v.* Bromley, 12 East, 250; Hatfield *v.* Thorpe, 5 B. & A. 589.

The rules and practice of the courts leave this point with some latitude of discretion. (Per KENT, Ch. J.) Ib.

If there be two or more subscribing witnesses to a deed, the calling of one to prove the deed, has always been held sufficient. (Per KENT, Ch. J.) Ib.

Where there were two subscribing witnesses to a paper, one of whom was proved to be dead, and the other living within the state, but too aged and infirm to attend the trial, proof of his handwriting is inadmissible, as his examination under oath, taken under an order of the court for that purpose, or under the statute, would be better evidence. Jackson ex dem. Bond v. Root, 18 Johns. Rep. 60.

To warrant giving parol evidence of a will not shown to be destroyed, it must be first proved that diligent search for it has been made, by or at the request of the party interested at the place where it is most likely it would be found; as among the papers of the devisor at his residence, if the will do not appear to have been deposited in any public office. Dan et al. v. Brown et al., 4 Cow. Rep. 483.

execution, this will be sufficient proof of the will, without calling the others;(*a*) and if there be two trials, and between them the witness who proved the execution of the will at the first trial should die, and there should be an order of court that the evidence of any witness upon the first trial, who should be dead at the time of the second, shall be read in evidence from the judge's notes, the deposition of such dead witness will be sufficient evidence of the due execution of the will at the second trial, although it should be proved that another subscribing witness was present in court.(*b*) If, however, the witness who is called can only prove his own share of the transaction, the other witnesses must be called. If, also, the will is disputed by the heir-at-law, he is always entitled to the testimony of all the subscribing witnesses; but then he must produce them himself, if the testimony of one is sufficient for the devisee.

If all the witnesses are dead, insane, or out *of the jurisdic- [*298]
tion of the court, proof of the handwriting of the devisor and witnesses, or of the devisor alone, if no proof of the *handwriting of the witnesses can be obtained, will be sufficient without evidence of the solemnities.(*c*)

If a subscribing witness should deny the execution of the will, he may be contradicted as to that fact by another subscribing witness;(*d*) and even if they all swear that the will was not duly executed, the devisee will be allowed to go into circumstantial evidence to prove its due execution.(*e*) So also, if one of the subscribing witnesses impeach the validity of the will on the ground of fraud, and accuse other witnesses who are dead, of being accomplices in the fraud, the devisee may give evidence of their general character.(*g*)

When an ejectment is brought by the devisee of a copyholder, he must prove his own admission, and the admission of his testator;(*h*)

(*a*) The rule is different in equity; and when a bill is filed in Chancery to establish a will, all the witnesses must be examined by the plaintiff; Hindson *v.* Kersey, 4 Burn. Ec. Law, 93; Ogle *v.* Cook, 1 Vez. 177; Townsend *v.* Ives, 1 Wils. 216.

(*b*) Wright *v.* Doe d. Tatham, 1 Ad. & Ell. 3.

(*c*) Hands *v.* James, Com. 531; Croft *v.* Pawlett, Stran. 1109.

(*d*) *Vide* Alexander *v.* Gibson, 2 Campb. 556.

(*e*) Lowe *v.* Joliffe, Blk. 365; Pike *v.* Badmering, cited Stran. 1096; Gilb. Evid. 69; B. N. P. 264.

(*g*) Doe d. Walker *v.* Stephenson, 3 Esp. 284; S. C., 4 Esp. 50.

(*h*) Roe d. Jefferey *v.* Hicks, 2 Wils. 13; Doe d. Vernon *v.* Vernon, 7 East, 8; ante, 47.

and these facts will be sufficiently established, by producing the original entries on the rolls of the manor by the proper officer (which entries the courts will compel the lord to permit his tenant to inspect,(*a*) and proving the identity of the parties admitted,(*b*) without [*299] also producing the *stamped copies required by the statute 55 Geo. III c. 184.(*c*) The will of the devisor must likewise be proved in the same manner as if the devise were of a freehold interest.

The statute 55 Geo. III. c. 192, which dispenses with the necessity of the surrender of copyholds to the use of the will of the copyholder, has been held to extend to those cases only, *where the surrender is merely formal; and, therefore, where by the custom of a [*300] manor, a *feme covert* was allowed by will to pass her *copyholds, the same having been previously surrendered by the husband and wife (the wife being examined separate and apart,) and the wife subsequently to the statute made her will, but without making a previous surrender, the copyholds did not pass; the surrender being matter of substance, and requiring to be accompanied by the separate examination of the wife.(*d*)

It is not necessary, in case the testator should be a marksman or blind, that the will should be read over to him previous to its execution.(*e*)

Declarations of a testator are admissible, where a will is disputed on account of fraud, circumvention, or forgery,(*g*) and evidence may also be given of declarations made by him, that he had attempted to destroy his will.(*h*)

If a will be more than thirty years old, it proves itself; and the age of the will is to be reckoned from the day it bears date, and not from

(*a*) Folkard *v.* Hemet, Blk. 1061; The King *v.* Shelly, 3 T. R. 141.
(*b*) Doe d. Hanson *v.* Smith, 1 Campb. 197.
(*c*) Doe d. Bennington *v.* Hall, 16 East, 208.
(*d*) Doe d. Nethercote *v.* Bartle, 5 B. & A. 492.
(*e*) Longchamp d. Goodfellow *v.* Fish, 2 N. R. 415.
(*g*) Doe d. Ellis *v.* Hardy, 1 M. & R. 525.
(*h*) Doe d. Reed *v.* Hawes, 7 C. & P. 331.

the time of the testator's death.(*a*)[1] And it is no objection that possession has not followed the will, because the court cannot know how the will directs the possession to go, until it is read.(*b*)

(*a*) Doe d. Oldham *v.* Wolley, 8 B. & C. 22; Lord Rancliffe *v.* Parsons, 6 Dow. 202; M'Kenire *v.* Fraser, 9 Vez. 5, *et vide n.* † to the case of Gough d. Calthorpe *v.* Gough, 4 T. R. 706, *in notis.*

(*b*) Doe d. Lloyd *v.* Passingham, 2 C. & P. 440.

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[1] In order that a will may be given in evidence as an ancient deed, there should have been a possession of thirty years, in conformity to it; a lapse of thirty years, since the execution of it by the testator, is insufficient. Jackson ex dem. Burhans *v.* Blanshan, 3 Johns. Rep. 292.

The acts or declarations of third persons, in possession of lands, are admissible in evidence to prove a continued possession under an ancient will, so as to make out its formal execution. Jackson ex dem. Van Dusen *v.* Van Dusen, 5 Johns. Rep. 144.

Mere efflux of time, as thirty years or more, from the date of a will, does not entitle it to be read without further proof. Jackson ex dem. Hunt et al. *v.* Luquere, 5 Cow. Rep. 221.

But possession for thirty years, under a will, entitles it to be read as an ancient will, without further proof, the same as a deed. Ib.; *Et vide*, Jackson ex dem. Henry *v.* Thompson, 6 Cow. Rep. 178.

And it seems, that it is not necessary to show that all the devisees were thus in possession under the will, but the possession of a part under it, will be sufficient. Ib.

A possession of part under a will, for less than thirty years, accompanied with proofs satisfactorily accounting for the absence of all the subscribing witnesses, as where they are dead; and proof of the hand-writing of one; and the acts of the devisees of the land in question; as possessing it, claiming under the will, and executing deeds of partition, reciting the will, and the like; are also sufficient to entitle it to be read in evidence, without farther proof. Ib.

An ancient deed which has not accompanied the possession, is not admissible in evidence, without proof of its execution. Arnold et al. *v.* Gorr et al., 1 Rawle's Rep. 223.

In the case of Jackson ex dem. Lewis et al *v.* Laroway, (3 Johns. Cas. 283, 286,) the will under which the plaintiff claimed was executed in 1723. Upon this instrument were several indorsements: (viz.) 1st, a certificate of the justice of the peace of the former colony of New York, dated in 1733, stating that one of the witnesses to the will had appeared before him, and deposed to the execution of the will by the testator as a voluntary act and deed: 2d, a certificate of one of the judges of the court of common pleas, of Dutchess county, dated the 9th of October, 1733, stating the like proof, before him, by another of the subscribing witnesses; a certificate of the clerk of Dutchess county, dated the 21st July, 1735, that the will was recorded in his office; 4th, a certificate dated the 16th May, 1744, signed by a judge and two assistant justices of the court of common pleas of Dutchess county, and also by the clerk of the same court, stating that the will had been proved before them, in open court, by the two witnesses above mentioned, who deposed that they saw the testator sign, seal, publish, and declare the same as his last will; that he was of sound mind; that they subscribed their names thereto, as witnesses, and that they also saw the other witness subscribe his name thereto as such. The premises in question lay in the county of Greene, late part of the county of Ulster, but never a part of Dutchess county. Neither the devisor nor any person claiming under his will, ever had actual possession of the premises in question, which were in a wild and uncultivated state, and actually in the possession of no one

A witness is not bound to produce, in obedience to a subpœna, a will which he holds as attorney for a devisee claiming *under it; although

until the year 1753, when possession was taken by the defendant's ancestors; but it did not appear that the heirs or representatives of the testator had any notice of that possession till a long time afterwards. It was held, that the "indorsements" could not be received as evidence of the due execution of the will, because the proofs which they certified were wholly unauthorized, either by the statute or common law. But that the proof of the handwriting of those persons who certified ought to have been received, with a view to show the antiquity of the instrument, and that it existed at the periods when those certificates bear date, and that this "would be a more satisfactory account of the will than to show that it had been found among the evidences of the testator's estate, or among the archives of his family, which, in similar cases, has been admitted to be sufficient." And Radcliff, J., who delivered the opinion of the court, said, "The general rule on this subject, I take to be, that a deed appearing to be of the age of thirty years may be given in evidence, without proof of its execution, if the possession be shown to have accompanied it, or where no possession has accompanied it, if such account be given of the deed as may be reasonably expected, under all the circumstances of the case, and will afford the presumption that it is genuine. This rule is founded on the necessity of admitting other proof as a substitute for the production of witnesses who cannot be supposed any longer to exist. A correspondent possession is always high evidence in support of such a deed; but where no such possession appears, other circumstances are admitted to account for it, and raise a legal presumption in its favor." *Et vide*, Jackson ex dem. Hunt et al. *v.* Luquere, 5 Cow. Rep. 225, 226, where this case is cited and confirmed.

In the case of Doe ex dem. Oldham et ux. v. Wolley, (8 Barn. & Cres. Rep. 22,) it appeared on the trial that the lessors of the plaintiff claimed as devisees of Francis Wolley, who was said to be the heir of T. Wolley, who died in 1800, seised of the estate in question, having devised it to his widow for life, remainder to his right heirs. This will was dated more than thirty years before the trial, but one of the subscribing witnesses was proved to be still living; and it was insisted for the defendant that he must be called to prove the execution of the will, as the testator had died within thirty years. The learned judge (Vaughan B.) thought that the thirty years must be computed from the date of the will, and overruled the objection. In order to prove that Francis Wolley was heir of T. Wolley, the testator, a deed was produced, being a settlement made in 1689, on the marriage of Thomas Wolley, the grandfather of T. Wolley, the testator, by which it appeared that he had several brothers, of whom Edward, the grandfather of Francis Wolley, was the youngest. No evidence was given to show what had become of the other brothers, or that they died without issue. But wills of some members of the family, made after the date of the marriage settlement, were produced, and they did not mention any brothers, except the grandfather of T. Wolley, the testator, and the grandfather of Francis Wolley. The judge said, that in the absence of any evidence to the contrary, the jury might presume that they died without issue; and the jury found a verdict for the plaintiff.

The defendant moved for a new trial, on two grounds: first, that the will of T. Wolley was improperly received in evidence, for that the plaintiff should have called the existing subscribing witnesses to prove the due execution of it. Secondly, the learned judge ought not to have allowed the jury to presume that the elder brothers of Francis Wolley's grandfather died without issue.

Lord Tenterden, C. J., (who delivered the opinion of the court,) said, "As to the first point, I am of opinion that the rule of computing the thirty years from the date of a deed, is equally applicable to a will. The principle upon which deeds after that period are re-

it is suggested that it is a will of personalty, and ought therefore to be deposited in the Ecclesiastical Court.(*a*)[1]

(*a*) Doe d. Carter *v.* James, 2 M. & R. 47.

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ceived in evidence, without proof of the execution, is, that the witnesses may be presumed to have died. But it was urged that when the existence of an attesting witness is proved, he must be called. That, however, would only be a trap for a non-suit. The party producing the will might know nothing of the existence of the witness until the time of the trial. The defendant might have ascertained it, and kept his knowledge a secret up to that time, in order to defeat the claimant. As to the other point, it must at all events be admitted that the death of the grandfather's brothers might be presumed, and then, in order to raise the objection, two affirmatives must be presumed, viz., that they did marry, and did leave issue. I think that would be very unreasonable, and that the direction of the learned judge was right." Rule refused.

In the case of Jackson ex dem. Bowman *v.* Christman, (4 Wen. Rep. 277, 282,) the plaintiff offered in evidence a will of more than forty years' standing after the death of the testator as an ancient will, without proof of its execution. It was objected to on the part of the defendant, but admitted by the circuit judge; whereupon a verdict was taken for the plaintiff, subject to the opinion of the supreme court, which was delivered by Sutherland, J., who said:

"I am inclined to think the will was properly admitted in evidence as an ancient will without proof of its execution, although one of the subscribing witnesses was shown to have been still alive and within the jurisdiction of the court. The will was executed in 1785, and the testator died in July, 1787. The cause was tried in 1828, and it was clearly proved that the lands devised by the will had, ever since the death of the testator, been held under the will and according to its provisions. The will, therefore, was more than 40 years of age, with a corresponding possession during the whole period. It is not denied, if the attestation of the witnesses had stated everything requisite to a complete and valid execution of the will, that it might have been read as an ancient will without further proof. 2 Esp. Rep. 665; 1 Phil. Ev. 408, 441; 4 T. R. 707, 709; 6 Cowen, 202; 3 Johns. Cas. 283; 3 Johns. R. 292; 6 Binney, 435.

"The attestation does not state that the witnesses subscribed their names in the presence of the testator. Although it is usual and proper to insert that fact in the attestation, it is not absolutely necessary, and the omission will not conclude the jury from finding that the will was so subscribed. Price *v.* Smith, Willes, 1; Croft *v.* Pawlet, 2 Strange, 1109; Hand *v.* James, 2 Comyn's R. 530; 4 Taunt. 217; Bull. N. P. 264; 1 Phil. Ev. 438, 440. It is a question for the consideration of the jury, to be determined upon the evidence; and if the witness had been produced, and had been unable to recollect any of the circumstances attending the execution of the will, the jury would, notwithstanding, have been bound to find in favor of its due execution. If the subscribing witnesses all swear that the will was not duly executed, the devisee may notwithstanding go into circumstantial evidence to prove its due execution; (Bull. N. P. 264; Strange, 1026, 1096; Lowe *v.* Joliffe, 1 Black. Rep. 365;) and what circumstances would justify a stronger presumption in favor of the validity of a will, than the fact that the devisees, who had all the means of knowledge in their power, treated it as a valid will, entered upon and divided the estate according to its provisions, and continued so to hold and enjoy their respective portions for more than forty years!"

[1] The N. Y. Revised Statutes, part 2, chap. 6, tit. 1, (Secs. 38, 39, 40, 41 and 46,) specify the modes in which wills may be revoked or cancelled.

If the lessor be the legatee of a term for years, he must give in evidence the probate of the will, and prove the assent of the executor to

Sec. 38. "A bond, agreement, or covenant, made for a valuable consideration, by a testator to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such a previous devise or bequest, either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, agreement or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.

Sec. 39. "A charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, shall be deemed a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein contained, shall pass and take effect, subject to such charge or incumbrance.

Sec. 40. "A conveyance, settlement, deed, or other act of a testator, by which his estate or interest in property, previously devised or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless in the instrument by which such alteration is made the intention is declared, that it shall operate as a revocation of such a previous devise or bequest.

Sec. 41. "But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen.

Sec. 46. "If, after the making of any will, the testator shall duly make and execute a second will, the destruction, cancelling or revocation of such second will, shall not revive the will, unless it appears by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless after such destruction, cancelling or revocation, he shall duly republish his first will."

The mere act of cancelling the will is nothing, unless it be done *animo revocandi*. Jackson ex dem. Howard v. Halloway, 7 Johns. Rep. 394.

So, if the testator, without a republication of his will, make alterations and corrections in it, with the intent not to destroy, but to enlarge and extend a devise already made, it is not a revocation of the devise. Ib.

Parol evidence of the revocation of a will, is inadmissible. Jacksou ex dem. Coe v. Kniffen, 2 Johns. Rep. 31. *Et vide* Dan et al. v. Brown et al., 4 Cow. Rep. 483.

A testator may revoke a will in whole or in part, any time before his death. Matter of Nan Mickel, 14 Johns. Rep. 324.

Where the execution of a will is established, there must, in order to revoke it, be some outward and visible sign of revocation or cancelling *animo revocandi*. Jackson ex dem. Browns v. Betts, 9 Cow. Rep. 208. *Et vide* S. C., 6 Cow. Rep. 377. *Et vide* Dan et al. v. Brown et al., 4 Cow. Rep. 483.

If a man let his will stand until his death, it is his will; otherwise, not. It is ambulatory till his death. Ibid.

Where there are two devises by the same testator, the last operates to a revocation of the first, only so far as it is inconsistent with it. As to the residue the former devise shall stand. Brant ex dem. Wilson v. Wilson, 8 Cow. Rep. 56.

So, a codicil not expressly revoking a former will of real estate, though it profess to

the bequest; for where a person bequeaths either specifically, or generally, goods or chattels, real or personal, and dies, the legatee cannot take them without the assent of the executors.(*a*) He must also prove the title of his testator, and show that he had a chattel and not a freehold interest in the premises; because when a party dies in possession, the presumption is that he is seised in fee. This is most commonly done by the production of the lease: but in a late case, where the les-

(*a*) 1 Inst. 111(*a*); ante, 52.

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make a disposition of the whole estate different from the will, if, in fact, it do not do so, but only in part, it is but a revocation *pro tanto*. Ibid.

A subsequent marriage and birth of a child, is an implied revocation of a will, if the testator did not, after those events took place, republish, or signify an intention that it should be established; and in such case, the will ought not to be proved, or admitted to record. Wilcox v. Rootes, 1 Wash. Rep. 140.

A will of personal estate was considered revoked by a subsequent will, which was established as sufficient to pass chattels, though not written or subscribed by the testator; the same, however, having been prepared by his directions, corrected, and afterwards declared by him, to be his will. Glasscock v. Smither & Hunt, 1 Call's Rep. 479.

If before the act of 1794, concerning wills, a man having children, made a will and devised his whole estate among them, after which he married a second wife, by whom he had children, and died without altering his will, the second marriage and birth of children, were no revocation of the will. Yerby v. Yerby, 3 Call's Rep. 334.

Circumstances may rebut an implied revocation of a will. Ib.

A testator made a will in due form of law, to which he afterwards subjoined a codicil: he then made a second will, and annexed a postscript to it, by which he "revoked all former wills," and signed the postscript: the second will was cancelled by cutting his name out from the body of it, but leaving the postscript with his name subjoined to it. This paper was carefully preserved by the testator; as also his first will; both of which were found after his death. It was determined that the postscript of the second will was a substantive revocation of the first; and that the cancelling of the second will did not necessarily cancel the postscript, so as to set up the first, as the will of the testator. Bates v. Holman, Ex'r, 3 Hen. & Munf. Rep. 502.

It seems, that a deed of trust, conveying all the property of the grantor to certain persons and their heirs, "forever, with warranty: nevertheless, upon special trust that they shall pay the profits to himself during his life;" concluding with declaring its true intent and meaning to be, that, at his death, "everything therein contained between the parties should become null and void," is a conveyance to the trustees and their heirs, of an estate for the life of the grantor only, and not a revocation of the previous will. Ib.

A commission of lunacy against a testator, is not a revocation of a will, which he made when of sound mind. Ib.

The parol declarations of a devisor will not amount to a revocation of a will of lands; nor can they be received upon a question of revocation, unless they relate to the *res gestæ*. They are then evidence to show the intent with which the act was done. Dan et al. v. Brown et al., 4 Cow. Rep. 483.

To revoke a will by cancellation, this must be done *animo revocandi*. The slightest degree of cancellation, &c., with intent to revoke, will operate as a revocation. Ib.

sor put in an answer of the defendant to a bill in equity, in which the defendant stated, that "he believed the lessor was *possessed* of the *leasehold* premises in the bill mentioned," it was held, as against the defendant, sufficient evidence that the interest of the testator was only a chattel interest.(*a*)[1]

[*301] *Thirdly, of the evidence necessary when a party claims the land under an execution.[2]

(*a*) Doe d. Digby *v.* Steel, 3 Campb. 115.

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[1] In ejectment for lands claimed under a will, it is no objection to giving in evidence papers relating to the lands, that part of the testator's interest had accrued after the making of the will. Burke v. Lessee of Young, 2 Serg. & R. Rep. 383.

A devise of lands will not pass lands acquired subsequently to the execution and publication of the will, without a republication. Jackson ex dem. Howard v. Holloway, 7 Johns. Rep. 390; S. P., Jackson ex dem. Rogers v. Potter, 9 Johns. Rep. 312.

Where the testator altered his will, by erasures and interlineations, so as to make the devise extend to all lands of which he should die seised; and indorsed a memorandum to that effect on the will, stating the alterations which he had made, but the memorandum was attested by two witnesses only; held, that the alteration was inoperative, and that, lands acquired subsequently to the date of the demise, descended to the heirs at law. Jackson ex dem. Howard v. Holloway, 7 Johns. Rep. 394.

A republication, so as to affect after-acquired lands, must be made with the same solemnities as the execution of the original will. Jackson ex dem. Rogers v. Potter, 9 Johns. Rep. 312.

Where a person made a will, in 1805, devising all his estate, and afterwards became seised of other lands, and, in his last sickness, in 1810, declared that he had made a disposition of all his estate, by a will which he had deposited with S., and that he did not wish to alter it, except to add another executor; this was held not to amount to a republication of the will, so as to pass the after-acquired lands. Ib.

Where any part of a will is ambiguous, the whole will is to be considered, for the purpose of ascertaining the intention of the testator, in that particular part: but, where the intention is clear and certain, and no repugnancy appears between the different parts of the will, no such aid is necessary or proper. Jackson ex dem. Van Vechten v. Sill, 11 Johns. Rep. 201.

Since the statute of wills, as well as before, a will may be construed in connection with another instrument in writing, to which it refers. Jackson ex dem. Herrick v. Babcock, 14 Johns. Rep. 389.

[2] In an ejectment for premises, where the lessor of the plaintiff is the party in the original action in which the execution issues, he is bound not only to produce the writ of *fieri facias* under which the sheriff has sold, but likewise the judgment. Doe ex dem. Bland v. Smith, 1 Holt's Rep. 589; 2 Starkie's Rep. 199.

It is no objection to the plaintiff's title, that, in the *fi. fa.* or *venditioni exponas*, under which the land was condemned and sold to him, the plaintiff was named as executrix of William M'Dowell, instead of William Dowell. It is only a clerical error, which would be amended at any time. Cluggage et al. v. Lessee of Duncan, 1 Serg & R. Rep. 111.

When an ejectment is brought by a tenant by *elegit*,(*a*) and the debtor is himself in possession of the land, the only evidence necessary is an

(*a*) Ante, 69, 109.

The sheriff's return to an *elegit* stated that he had delivered an equal moiety of a house: held, that this return was void for not setting out the moiety by metes and bounds, and that the objection might be taken at *nisi prius* to an ejectment brought upon the *elegit*. Fenny ex dem. Masters v. Durant, 1 Barn. & Ald. Rep. 40.

In an action of ejectment, by a purchaser under a sheriff's sale against a debtor, who refuses to give up the possession of the land, it is incumbent on the plaintiff to produce the judgment and the writ of *fieri facias*, and to prove the sale of the land, which may be done either by a deed from the sheriff or a return of the *fieri facias*. They are sufficient to entitle him to recover. Fenwick v. Floyd's Lessee, 1 Harr. & Gill's Rep. 172.

In the absence of a deed from the sheriff, and his return to the *fieri facias*, a memorandum, in writing, of the sale must be produced, to take the case out of the statute of frauds. Ibid.

A sheriff's return to a *fieri facias*, which states a levy on "part of a tract of land called," &c., is void for uncertainty, cannot be set up by matter *de hors* the return, and a sale under it passes no title. But, a levy on "a tract of land called," &c., under a *fieri facias*, against a person who was seised of a part of such tract, and a sale under it, will pass his interest to the purchase. Thomas's lessee v. Turvey, 1 Harr. & Gill's Rep. 435; Clark v. Belmear, 1 Gill & Johns. Rep. 443.

In an action of ejectment, brought by a purchaser under a sheriff's deed against the defendant in the execution, the defendant cannot question the title. The plaintiff need show only the judgment, execution, and the sheriff's deed. The sheriff stands in the situation of the attorney of the party, appointed by law to sell and convey, and his deed stands on the same footing with the deed of the party himself. Cooper's lessee v. Galbraith, 3 Wash. C. C. Rep. 546.

Under the act of 3rd of April, 1804, [Pennsylvania,] for selling unseated lands for taxes, the title given by the sheriff is good after five years have elapsed from the sale, without action being brought, whether the proceedings were regular or irregular; and that, notwithstanding the sale was for taxes due before the passing of the act, and the purchaser had not entered on the land. Parish et al. v Stevens, 3 Serg. & R. Rep. 298.

On a sale of unseated lands for taxes, if no tenant be on the land, the law will presume the purchaser for taxes to be in possession; and if he will not appear and defend his title, judgment will be given against him. Ib.

A difference between the sheriff's deed and the levy, *venditioni exponas*, and conditions of sale in stating the number of acres contained in a tract of land, is unimportant. Arnold et al. v. Gorr et al., 1 Rawle's Rep. 223.

Though the conditions of sale are not essential to support an ejectment by the sheriff's vendee, yet, being part of the *res gestæ*, they are admissible in evidence. Ib.

If the recital of executions in a sheriff's deed of land describe them correctly in several particulars, but add others which are inaccurate, the latter may be regarded as surplusage. All that is necessary is, that the deed show that the sheriff acted under the authority of the execution, even admitting the recital to be important. Jackson ex dem. Witherell et al. v. Jones, 9 Cow. Rep. 182.

But the execution need not be set forth or recited in a sheriff's deed, and if recited and described inaccurately, the variance will not affect the deed. Ib.

examined copy of the judgment roll, containing the award of the *elegit*, and return of the inquisition. But if the possession is in a third

The record of a judgment, sheriff's sale thereon, sheriff's deed, and *mesne* conveyances to the party offering them, are not evidence, where no interest in the land sold by the sheriff, is shown in the defendant in the judgment. Arnold et al. v. Gorr et al., 1 Rawle's Rep. 223.

A defendant whose property has been sold by the sheriff, cannot defeat the purchaser in obtaining possession by connecting himself with one who may have a good title. Ib.

In an action of ejectment, brought by the purchaser to recover possession of land purchased by him at a sheriff's sale, it is not necessary for the plaintiff to prove a seizure of the land by the sheriff for the purpose of supporting his title. Estep & Hall's Lessee v. Weems, 6 Gill & Johns. Rep. 303.

A. obtained a judgment which was void: upon which, however, execution issued, and was levied upon the land of the defendant. It was purchased by B.; A. afterwards acquired the title by purchase: held, that he could recover in ejectment against B. Henderson v. Overton, 1 Yerger's Rep. 394.

A judgment was rendered against A., who, on the same day, executed a conveyance of certain real estate; held, in the absence of evidence to show which act was first, that the titles were equal, and that the defendant must prevail. Murfree's heirs v. Cormack, 4 Yerger's Rep. 270.

Quære. Whether, in general, possession is notice of a claim. Covert et al. v. Irwin et al. 3 Serg. & Rep. 283.

But if there be a sale of land by the sheriff, as the property of A.; and B., who is in possession, stand by, knowing that he is represented as the tenant of A., and do not contradict it, he cannot afterwards contest the title of A. with the purchaser. Ib.

Where both plaintiff and defendant in ejectment claim under a sale of unseated lands for taxes, the plaintiff is entitled to recover, without a direct proof of the title being out of the commonwealth. Stewart v. Shoenfelt, 13 Serg. & R. Rep. 360.

The statute 1731, c. 44, sec. 3, (Connecticut,) prohibits sheriffs from making or filling up any plaint, declaration, writ, or process, and provides that "all such acts done by either of them shall be void." A writ and declaration were written by a deputy sheriff; an attachment of land upon the writ, and the land seasonably set off on an execution issued on a judgment recovered in the suit. Subsequently to the attachment, and previously to the judgment, the debtor conveyed the land to a *bona fide* purchaser for a good consideration. It was held, that this conveyance defeated the attachment, and that the title of the purchaser was good against the judgment creditor. Smith v. Saxton, 6 Picker. Rep. 483.

It seems that, as between the parties, the judgment is good. Ib.

Where a title is claimed under a sheriff's sale, it is indispensable to produce the judgment on which the execution issued. Smith v Moorman, 1 Monroe's Rep. 154.

The purchaser has a right to resort to the whole judicial proceedings. Clarke v. Belmear, 1 Gill & Johns. Rep. 443.

In an action by a purchaser at a sheriff's sale against the tenants upon the premises, one of whom is the defendant in the execution under which the purchase is made, a vendee, to whom the defendant in the execution conveyed the premises, is a competent witness on the part of the defendants to prove that they are tenants under him. M'Gee v. Eastis, Stewart & Porter's Rep. 426.

If, by reason of unlawful charges, too much land is taken and set off to the creditor, the proceeding, being an entire and indivisible act, is wholly void. Beach et al. v. Walker, 6 Conn. Rep. 190.

person, the lessor must either show that such third person came into possession under the debtor, and that his right to the possession has ceased; or (should the party in possession hold adversely *to the debtor) be prepared with evidence of his debtor's title.(*a*)

When the debtor and his tenants are made defendants jointly, after proof of a *prima facie* title to the whole premises in the debtor, it is incumbent on the other parties to show their better title, as for example, by tenancy anterior to the judgment or the like, or the *elegit* creditor must recover.(*b*) It is not necessary in any case to prove a copy of the *elegit* and inquisition.(*c*)

The conusee of a statute merchant, when the debtor is in possession, must prove a copy of the statute, of the *capias si laicus*, and extent and *liberate* returned; for although by the return of the extent an interest is vested in the conusee, yet the actual possession of that interest is acquired by the *liberate*.(*d*)

The same *proofs are also necessary, when a third person is [*302] in possession, as in the case of a tenant by *elegit*.(*e*)

When the ejectment is to recover lands taken in execution, under a writ of *fieri facias*, on a judgment obtained against a termor, if the

(*a*) Doe d. Da Costa *v.* Wharton, 8 T. R. 2.
(*b*) Doe d. Evans *v.* Owen and others, 2 Tyr. 149.
(*c*) Ramsbottom *v.* Brickhurst, 2 M. & S. 565.
(*d*) Hammond *v.* Wood, 2 Salk. 563.
(*e*) Ante, 301.

Where the execution debtor refused to choose an appraiser; and the creditor, without the concurrence of the debtor, appointed the three appraisers; and the officer thereupon proceeded to set off the land levied upon, and stated in his return, that the appraisers were mutually agreed on by the creditor and the debtor; it was held, in an action of ejectment for the land brought by the devisees of the creditor against the debtor, that these facts evinced a fraudulent combination between the creditor and the officer, by reason of which the creditor acquired no title to the land. Watson et al. v. Watson, 6 Conn. Rep. 334.

Where the defendants in ejectment come into possession as tenants of the person as whose property the land in dispute was sold by the sheriff, under a judgment confessed by him, they cannot set up, as a defence, a mortgage and release of the equity of redemption, given to one of them by the defendant in the judgment. Eisenhart et al. v. Slaymaker, 14 Serg. & R. Rep. 153.

See Morse et al. v. Doe d. O'Neal, 1 Carter's Indiana Rep. 69; Doe d. Weirick v. Ross, Ib. 99.

party in the original action, in which the execution issues, is the claimant, the judgment must be proved.(*a*) But the writ alone is a sufficient title to the vendee of the sheriff.(*b*) And where an assignment of a lease by deed taken in execution, was made by the under-sheriff in the name, and under the seal of office of the sheriff, it was held unnecessary to prove his authority.(*c*)

*Fourthly, of the proofs to be given, when the claimant is a parson.

When a parson brings ejectment for the parsonage-house, glebe, or tithes, he must prove his admission, institution, and induction;(*d*) but he need not show a title in his patron, for institution and induction, although upon the presentation of a stranger, are sufficient to put the rightful patron to his *quare impedit*.(*e*)

[*303] Presentation may be by parol, or by writing *in the nature of a letter to the bishop;(*g*) in the latter case it may be proved by production of the letter; in the former by a witness who was present and heard it; but it cannot be proved by the person making the presentation, although he were only grantee of the avoidance.(*h*) The ceremony of institution may be proved by the letters testimonial of institution; or by the official entry in the public register of the diocese, which ought regularly to record the time of the institution, and on whose presentation it was given. This entry, therefore, if regularly made, is proof of the presentation, as well as of the institution. The induction may be proved, either by some person present at the ceremony, or by the indorsement on the mandate of the ordinary to induct, or by the return of the mandate, if any has been made.(*i*)

Proof was formerly required that the claimant had read and subscribed the thirty-nine articles, according to the statute, and declared his assent and consent to all things contained in the book of Common

(*a*) Doe d. Bland *v.* Smith, 2 Star. 199; S. C., Holt, 589.
(*b*) Doe d. Batten *v.* Murless, 6 M. & S. 113: *et vide* Doe d. Emmet *v.* Thorn, 1 M. & S. 425.
(*c*) Doe d. James *v.* Brown, 5 B. & A. 243.
(*d*) Snow d. Crawley *v.* Phillips, 1 Sid. 220.
(*e*) B. N. P. 105.
(*g*) Co. Litt. 120,(*a*); B. N. P. 105; The King *v.* Eriswell, 3 T. R. 723.
(*h*) B. N. P. 105.
(*i*) Chapman *v.* Beard, 3 Ans. 942.

Prayer; but this is no longer held to be necessary, unless some ground be laid by the defendant to *show, that he has not complied with these requisites; because the presumption is, that every man has conformed to the law, until there be some evidence to the contrary.(*a*)

Entries made by a deceased rector in his books, may be given in evidence by his successor,(*b*) upon a question of tithes; and he is also entitled to give in evidence such terriers as have been regularly made and preserved in the proper repository; that is to say, such terriers as are signed by a churchwarden, or (if the churchwardens are nominated by the parson) by some of the substantial inhabitants of the parish,(*c*) and are found either in the bishop's register office,(*d*) or in the register of the archdeacon of the diocese.(*e*) It is not necessary that the terrier should be signed by the parson; but, unless it possesses the marks of authenticity above mentioned, it cannot in general be received in evidence. But where a terrier was found in the registry of the dean and chapter of Lichfield, it was admitted in evidence against one of the prebendaries, upon the principle that there appeared to be a proper connection between the terrier, and the place where it was found.(*g*) The declarations of a former incumbent are evidence against his successor.(*h*)

An ejectment for a parsonage and glebe, will not be supported, by showing that the defendant entered and took the tithes belonging thereto; because the tithes and the rectory are not the same.(*i*)

When a lay impropriator brings an ejectment for tithes, the †strict proof of title is to show that the rectory originally belonged to one of the dissolved *monasteries, and was granted by the [*305] crown to those under whom he claims;(*k*) but, as deeds and instruments are liable to be lost, length of possession, and old deeds conveying tithes, have been deemed sufficient evidence of title.(*l*)

(*a*) Powell *v.* Milburn, 3 Wils. 355; S. C., 2 Black. 851.
(*b*) Glynn *v.* Bank of England, 2 Vez. 38, 43; Roe d. Brune *v.* Rawlins, 7 East, 279, 290.
(*c*) B. N. P. 248; Earl *v.* Lewis, 4 Esp. 3.
(*d*) Atkins *v.* Hatton, 4 Gwill. 1406.
(*e*) Potts *v.* Durant, 4 Gwill. 1050, 1054.
(*g*) Miller *v.* Foster, 4 Gwill. 1406.
(*h*) Doe d. Coyle *v.* Cole, 6 C. & P. 359.
(*i*) Hem *v.* Stroud, Latch, 61.
(*k*) *Vide* Com. 651.
(*l*) Kinaston *v.* Clarke, 5 T. R. 265, *in notis*.

Fifthly, of the proofs required, when the action is brought by a guardian, for the lands of an infant.

If the claimant be a guardian in socage,(*a*) he must prove the seisin of the person for whom his ward claims;(*b*) the heirship of the ward; that he was under the age of fourteen years at the time of the demise in the declaration; and that amongst those relations to whom the inheritance cannot descend, he himself is the next of blood to the ward.(*c*)

If the claimant be a testamentary guardian appointed by statute 12 Car. II. c. 24, s. 8, he must prove the seisin of the father; the due execution of the deed or will, which appoints him guardian; and the minority of the ward at the time of the demise.

Sixthly, of the proofs required by churchwardens and overseers under statute 59 Geo. III. c. 12, s. 17.

If the holding be adverse to the claimants, the title to the premises, as well as the appointments of the lessors as church-wardens and overseers, must be regularly proved; but if the premises have been used as parish houses, proof that the parish officers have from time to time placed the parish poor in them, *together with the appointments of the lessors to their respective offices, will be sufficient. It will not be necessary, in such cases, to prove any notice to quit or demand of possession; and if the paupers so placed in the premises, shall have given up their possession to some third person, who claims them as his own, he cannot set up that claim in answer to an ejectment brought by the parish officers.(*d*)

Seventhly, of the proofs required by persons claiming in a representative character, that is to say, by assignees of bankrupts, or insolvent debtors,(*e*) and by executors and administrators.

[*306] *The production of the proceedings properly authenticated,

(*a*) Ante, 49.
(*b*) Ante, 28.
(*c*) Litt. Sec. 123; Doe d. Rigge *v.* Bell, 5 T. R. 471.
(*d*) Doe d. Haden *v.* Burton, 9 C. & P. 254.
(*e*) *Vide*, Com. 651.

is the only species of proof now required in the two former cases, beyond the proof of the title of the bankrupt or insolvent.(*a*)

When an ejectment is brought by a personal representative, he must show his representative character by producing the probate of the will, or letters of administration, or the book of the Ecclesiastical Court, wherein they are entered,(*b*) in addition to the proof of his testator's, or intestate's, title. But minutes of the proof of the will and sealing of the probate, indorsed on the will by the surrogate and registrar of the Ecclesiastical Court, will be sufficient, upon proof that, by the practice *of the particular court, no other record of such grant is kept.(*c*)

Eighthly, of the proofs by a lord of the manor, and by copyholders.

When a lord seises the land as forfeited *pro defectu tenentis*, if he seise absolutely, he must prove a custom in the manor entitling him to do so; but if he seise only *quousque*, the custom need not be proved; and an absolute seisure unwarranted by the custom, cannot afterwards be set up as a seisure *quousque*.(*d*) He must also prove that the regular proclamations have been made, and in one report of Lord Salisbury's case,(*d*) it is said, that the proclamations must be proved by *viva voce* evidence, and that the entry thereof on the court rolls is not sufficient; but no *mention is made of this point [*308] in the other report of the same case, nor does it appear in a modern similar decision, that any evidence of this nature was required.(*e*)

When the lord of a manor brings an ejectment for a forfeiture, he must prove that he was lord at the time of the forfeiture committed, (unless the act of forfeiture destroys the estate, in which case, the heir of such lord may also take advantage of it,)(*g*) and that the person,

(*a*) A lessor whose property has been assigned to a provisional assignee, under the Insolvent Debtors' Act, cannot eject an occupier of land, which passed under the assignment, although the provisional assignee has never taken possession, nor any permanent assignee been appointed, nor the rent ever withheld from the lessor. (Best, C. J., *dis.*) Doe d. Palmer *v.* Andrews, 4 Bing. 348.

(*b*) Garret *v.* Lister, 1 Lev. 25; Elden *v.* Keddell, 8 East, 187; *Cont.* B. N. P. 108.

(*c*) Doe d. Basset *v.* Edwards, 7 Ad. & Ell. 240.

(*d*) Lord Salisbury's case, 1 Lev. 63; S. C., 1 Keb. 287.

(*e*) Doe d. Tarrant *v.* Hellier, 3 T. R. 162.

(*g*) Ante, 44.

who is alleged to have committed the forfeiture, has been admitted tenant on the rolls of the manor. Proof of the admittance of the father, and of the descent to the copyholder as son and heir, and payment of quit-rents by him, will not be sufficient evidence: the tenant must be himself admitted, for nothing vests in a copyholder which he can forfeit, before admittance and entry. The act of forfeiture must of course also be proved; but proof is *not required of the presentment of the forfeiture, nor of the entry, or seisure of the lord;(a) nor will the defendant be allowed, having been admitted and done fealty, to show that the *legal* estate was not in the lord at the time of admittance.(b)

Upon a question whether a slip of land between some old enclosures and the highway, vested in the lord of the manor or the owner of the adjoining freehold, evidence was received of acts of ownership by the lord on similar slips of land not adjoining his own freehold, in various parts of the manor.(c)

Proof of the party under whom the lessor claims having held a court many years ago, and of the lessor himself having held courts and also appointed gamekeepers, is *prima facie* evidence that a manor exists, and that the claimant is the lord, without the production of court rolls or any documentary evidence of courts having been held.(d)

The legality of the title of the lord or steward who admits a copyholder is immaterial, provided the admission is in pursuance of a surrender, and not a voluntary grant from the lord;(e) and a record in the record book of the manor, of admittance to a copyhold, reciting a surrender of the same copyhold to the use of a will, is admissible evidence of the surrender, the steward not being able to find the surrender itself on the roll or elsewhere, and the surrender being irregularly kept in the manor, although all the other surrenders were either preserved or recorded on the roll.(g)

(a) Roe d. Jeffreys *v.* Hicks, 2 Wils. 13; Doe d. Foley *v.* Wilson, 11 East, 56; B. N. P. 108; *et vide*, Watk. Copy. v. i. 324 to 353.
(b) Doe d. Nepean *v.* Budden, 5 B. & A. 626.
(c) Doe d. Barrett *v.* Kemp, 7 Bing 332.
(d) Doe d. Beck *v.* Heakin, 6 Ad. & Ell. 495.
(e) Doe d. Burgess *v.* Thompson, 1 Nev. & P. 215.
(g) Rex *v.* Inhabitants of Thruscross, 1 Ad. & Ell. 126.

*The court rolls, containing a presentment of an admittance upon a surrender out of court, are *prima facie* evidence of the surrender as between surrenderor and surrenderee, without producing the original surrender, or inquiring into the sufficiency of the stamp upon it.(*a*)

A copyholder who has been admitted to a tenement, and done fealty to the lord of the manor, is estopped, in an action by the latter for a forfeiture, from showing that the legal estate was not in the lord at the time of admittance.(*b*)

A lord of a manor cannot maintain ejectment for mines upon his manor, without proof that he has been actually possessed of them within the last twenty *years; because they are a distinct [*309] possession from the manor, and may be of different inheritances.(*c*) And a verdict in trover, for lead dug out of them, will not be evidence of the possession of the mines, for trover may be brought on property without possession.(*d*)

The doctrine of presumption extends to copyhold lands, and upon proper evidence an enfranchisement of them may be presumed even against the crown.(*e*)

When an ejectment is brought by the surrenderee of copyhold lands, he must prove the surrender to his use, and his subsequent admittance; but it is immaterial whether the admittance be before or after the day of the demise in the declaration.(*g*)

But where the lessor claims as heir, or under a grant of a †reversion by the lord expectant on a life estate, proof of admittance is unnecessary.(*h*)

When a copyholder was convicted of a capital felony, but pardoned upon condition of remaining two years in prison, and the lord did not

(*a*) Doe d. Garrod *v.* Olley, 12 Ad. & Ell. 481.
(*b*) Doe d. Nepean *v.* Budden, 1 D. & R. 243; 6 B. & Ad. 626.
(*c*) Rich *v.* Johnson, Stran. 1142.
(*d*) R. N. P. 102.
(*e*) Roe d. Johnson *v.* Ireland, 11 East, 220.
(*g*) Ante, 46.
(*h*) Ante, 46; Roe d. Cosh *v.* Loveless, 2 B. & A. 453.

do any act towards seising the copyhold, it was held that at the expiration of the two years the copyholder might maintain ejectment for the land against one who had ousted him, inasmuch as the pardon had restored his competency, and the estate would not vest in the lord without any act done by him.(*a*)

[*310] *We must now consider the proofs required when a privity exists between the defendant and the lessor of the plaintiff, or those from whom he derives title; and herein of the cases relative to the estoppel of parties in such cases from controverting the claimant's title.

Privities of this description principally happen in three different cases. Firstly, when the relation of mortgagor and mortgagee exists between the parties; secondly, when that of landlord and tenant has existed; and, thirdly, when the defendant has been admitted into possession under a void lease, or pending a treaty for a purchase, or under circumstances of a like character.(*b*)

Firstly, Of the proofs by mortgagees.[1]

(*a*) Doe d. Evans *v.* Evans, 5 B. & C. 584.
(*b*) Ante, 75.

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[1] An ejectment may be supported on a mortgage before all the instalments become due. Smith et al Surviving Executors v. Shuler et al., 12 Serg. & R. Rep. 240.

In Pennsylvania, this is the proper mode of enforcing the payment of instalments due upon mortgages. Knaub v. Eseek, 2 Watt's Rep. 282.

In ejectment by a mortgagee against a judgment creditor of the mortgagor, who bought the land under a sale on his judgment, evidence is admissible that the defendant was present at the sale, knew of plaintiff's mortgage, (which was given before the judgment, though not recorded till after,) and that the sheriff expressly sold the land subject to the mortgage. Muse v. Letterman, 13 Serg. & R. Rep. 167.

Where judgment has been obtained in a *scire facias* on a mortgage, evidence is not admissible afterwards in an ejectment to show payment of the mortgage debt prior to the judgment. Blythe v. M'Clintie, 7 Serg. & R. Rep. 341.

In ejectment by the mortgagee, the defendant may prove by parol that the mortgage debt is paid, which is a good defence to the action. Jackson ex dem. Roosevelt v. Stackhouse, 1 Cowen's Rep. 122.

Where a plaintiff claims to recover under a mortgage as forfeited, it is enough that it be found by a special verdict that there is a mortgage, and that from its terms it appears that the day of payment was past at the commencement of the suit; it is not necessary that the jury should find the non-payment of the mortgage moneys. Rogers v. The Eagle Fire Co. of New York, 9 Wen. 611.

When the lessor of the plaintiff is the mortgagee of the premises, and the mortgagor is himself the defendant, proof of the due execution of the mortgage deeds *is the only evidence re- [*307] quired.(a) Proof of a notice to quit or demand possession is

(a) Ante, 77.

The mortgagee does not divest himself of the right to maintain an ejectment by filing a bill to foreclose in connection with a second mortgagee, procuring an order of sale, and accepting the sheriff's deed for the premises. Den v. Stockton, 7 Halst. 322.

In ejectment by a mortgagee to recover premises sold under a judgment on his mortgage, evidence is not admissible to show that the *scire facias* on the mortgage which was returned served, was not served.

Nor is evidence admissible to show that mortgage money, for which judgment was recovered by default, was paid. Blythe et al. v. Richards, 10 Serg. & R. Rep. 261.

In an action of ejectment, evidence of usury in the consideration of a mortgage deed, by virtue of which the plaintiff claimed title, was held to be admissible as a defence, under the general issue, without notice. Holton v. Button et al., 4 Conn. Rep. 436.

A general notice of usury, without stating therein the facts relied on, in a case in which notice is necessary, is insufficient. Ib.

By deed, a mortgagee conveyed to the mortgagor the legal estate, on being paid the mortgage money, and the latter reconveyed it to trustees, for the purpose of securing an annuity. At the time of the execution by the mortgagee, there were several blanks in the deed, but not in that part which affected him. The blanks left were for the sums to be received by the mortgagor from the grantees of the annuity, and were all filled up at the time of the execution of the deed by the mortgagor; but several interlineations were made in that part of the deed, after the execution by the mortgagee. It was held, that the deed was not therefore void, but operated as a good conveyance of the estate from the mortgagor to the trustees for the payment of the annuity. Doe ex dem. Lewis et al. v. Bingham, 4 Barn. & Ald. Rep. 672.

Held, also, that it was not incumbent on the plaintiff in ejectment, brought on this deed, to prove that the annuity was duly enrolled. Ib.

Held, also, that the tenant in possession was not competent to prove that the witness, and not the defendant, was the possessor of the lands. Ib.

A note described in the condition of a mortgage need not be produced in an action of ejectment, where the equity has been released by the mortgagor in satisfaction of the note. Marshall v. Wood, 5 Verm. 250.

Where, by the terms of a mortgage, money is to be paid on or before a given day, and it is paid subsequent to that day, the mortgagee may still bring his action on the mortgage. Faulkner v. Brockenborough, 4 Rand. 245.

The borrower may bring ejectment, without bringing the money into court, where the rents and profits received by the lender are equal to the principal and interest. Wharf v. Howell, 5 Binn. 499.

Ejectment on a mortgage, though the statute of limitations had run against the debt. Reed v. Shapley, 6 Verm. 602.

Mortgagee required to produce evidence of breach, and, perhaps, waste. Dearborn v. Dearborn, 9 New Hamp. 117.

The indebtedness for which the mortgage was given need not be alleged, and if alleged, it need not be proved. Day v. Perkins, 2 Sandf. Ch. Rep. 359.

not necessary.(*a*)[1] But if the ejectment be against a third *person, who holds the mortgaged lands as tenant to the mortgagor, it will be also necessary to give evidence of such tenancy, and either of its regular determination, or that it was created by the mortgagor subsequently to the execution of the mortgage deed.(*b*)[2]

The proofs are the same when the assignee of a mortgagee is the claimant, with the additional proof of the derivative title of the assignee from the mortgagee.[3]

The mere fact of a mortgagee having received interest on the mortgage down to a time later than the day of the demise in the declaration, does not amount to a recognition by him, that the mortgagor or his tenant was in lawful possession of the premises until the time when such interest was paid, and consequently is no defence to an ejectment brought by the mortgagee.(*c*)

In an ejectment by a mortgagee against the assignee (under the Insolvent Act) of the mortgagor, it has been ruled, that a letter from the mortgagor to the mortgagee, dated previously to the assignment, is evidence against the defendant, and will be presumed to have been written at the time of its date, until the contrary is shown.(*d*)

Proof of the title of the mortgagee must of course be given, if the defendant hold adversely to such title; but if it appear upon the evidence that the defendant, although not the mortgagor, is in reality defending for his benefit, he will be subject to the same rules with regard to proofs, and be estopped in the same manner from disputing the mortgagee's title as the mortgagor himself.(*e*)

(*a*) Doe d. Fisher *v.* Giles, 5 Bing. 241; Doe d. Robey *v.* Maisey, 2 B. & C. 767.

(*b*) Keech *v.* Hall, Doug. 21; Thunder d. Weaver *v.* Belcher, 3 East, 449; Birch *v.* Wright, 1 T. R. 378; Doe d. Clark *v.* Trappaud, 1 Stark. 281.

(*c*) Doe d. Rogers *v.* Cadwallader, 2 B. & Ad. 473.

(*d*) Goodtitle d. Baker *v.* Millburn, 2 M. & S. 853.

(*e*) Doe d. Hurst *v.* Clifton, 4 Ad. & Ell. 813.

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[1] See Jackson *v.* Longhead, 2 Johns. 75; Jackson *v.* Hopkins, ib; Jackson *v.* Stafford, 2 Cowen, 547; Jackson *v.* Colden, 4 Cowen, 266; Fuller *v.* Wadsworth, 2 Iredell, 263.

[2] The tenant of a mortgagor, under a contract to purchase, is not entitled to a notice to quit. Jackson *v.* Stackhouse, 1 Cowen, 122.

[3] Den. *v.* Vanness, 5 Halst. 102.

*The following decisions with respect to the rights of mortgagors, or those claiming under them, to dispute the title of the mortgagee, have been reported.

Where the mortgage was by lease and release, and the release recited that the releasor was legally or *equitably entitled* to the premises conveyed, and he covenanted that he was lawfully or *equitably* seised in his demesne of and in the premises, and otherwise well entitled to the same, and the legal estate was subsequently conveyed to him; and he afterwards, for a valuable consideration, conveyed the same to a third party; upon ejectment brought by the mortgagee against such third party, it was held that there being in the release no certain or precise averment of any seisin in the releasor, but only a recital or covenant that he was legally or *equitably* entitled, the defendant was not estopped from setting up the legal estate acquired by him after execution of the release. It was also held that the release did not operate as an estoppel by virtue of the words, "granted, bargained, sold, aliened, remised, released," &c., because the release passed nothing but what the releasor had at the time, and he had not the legal title in the premises at the time of the release. It was also held that the case did not fall within the rule, that a mortgagor cannot dispute the title of his mortgagee, because the party claimed, as a purchaser for a valuable consideration without notice, a legal interest which was not in the mortgagor at the time of the mortgage, he having at that time an equitable interest only, to which his title was not disputed.(*a*)

M., being seised in fee, mortgaged to O., but remained in possession, and afterwards demised part to B., who also entered, after which M. mortgaged to H. H., after this, received rent from B., and demised the other part to A.—afterwards B. and A., on notice from O., paid O. rent, H. then brought †ejectment (after notice to quit) against B. and A. It was held that B. and A. might both show in defence, the first mortgage to O., O.'s notice to them, and their payment of rent to O.; for that, although B. could not dispute M.'s title at the time of the demise, he might show that H. had no derivative title, and he was not precluded by having paid rent to H. under a mistake of the facts. Also, that A., by showing that M., at the time of the demise to him, was only mortgagor in possession, did not impugn M.'s right to confer upon him by

(*a*) Right d. Jeffreys *v.* Bucknell, 2 B. & Ad. 278.

the demise, a legal title to the possession, but might show that M. had since been treated as a trespasser by the mortgagee, so as to determine M.'s right; and that O.'s notice to the tenant to pay him the rent might, if received in evidence, tend to show that by so doing, O. treated the mortgagor as a trespasser.(*a*)

Where a canon demised by way of mortgage, "all the canonry of him, the said A. B., and all the lands, messuages, &c., thereunto belonging," he was not estopped by the mortgage deed from showing that the house in respect of which the ejectment was brought, and which had been assigned to him on his installation as canon, and of which he still retained possession, did not belong to the canonry.(*b*)

Where V., having a defective title, mortgaged land in fee to O., and continued in possession, and afterwards a lease was granted to him by the real owner in pursuance of an award; it was held that V. could not set up such lease as an answer to an ejectment brought by O.(*c*)

Secondly, of the proofs by landlords against tenants.

When the relation of landlord and tenant subsists between the parties, the tenancy may be determined, as we have already observed,(*d*) in three several ways. First, by the efflux of time, or the hap-
[*311] pening of a particular event. Secondly, by a notice from *the landlord to the tenant to deliver up the possession, or *vice versa*;[1] and, thirdly, by a breach on the part of the tenant of any condition of his tenancy, as by the non-payment of rent, or non-performance of a covenant.

(*a*) Doe d. Higginbotham *v.* Barton, 11 Ad. & Ell. 307.
(*b*) Doe d. Butcher *v.* Musgrave, 1 M. & G. 625.
(*c*) Doe d. Ogle *v.* Vickers, 4 Add. & Ell. 782.
(*d*) Ante. 73, 74.

[1] A tenancy at will is held to be a tenancy from year to year, merely for the purpose of a notice to quit. Bradley *v.* Covel, 4 Cowen's Rep. 349.

A shorter notice (e. g. three months,) will terminate the tenancy; but in such case, where the holding is at a stated rent, the notice turns the tenancy at will into a tenancy from year to year, running from the expiration of the first notice, in order to warrant an ejectment; and the holding upon the tenancy from year to year is at the former rent. Ibid.

Where the tenant holds over after such notice, without any new stipulation, the law implies an agreement that it should be at the former rent. Ibid.

When the tenancy is determined by the effiux of time, if the demise be by deed, or other writing, the lessor has only to prove the counterpart of the lease by one of the subscribing witnesses; and it is not necessary that he should have given notice to the tenant to produce the original lease, to enable him so to do.(*a*) If there is no counterpart, notice to produce the original lease should be given, and then, but not otherwise, the claimant will be entitled, if the original lease be not produced, to give secondary evidence of its contents. If the demise be by parol, the agreement may be proved by any person present at the making of it; but if it should appear on the trial, by the witnesses on the part of the plaintiff, that a written agreement has at any time been drawn up between the lessor, and the party under whom the defendant came into possession, it must be produced by the plaintiff.(*b*) It is not necessary for the lessor, when the tenant holds under a lease, to prove that he, or those under whom he claims, has received the reserved rent within the last twenty years.(*c*)

Where the tenancy is determined by the happening of a particular event, the lessor must of course also *prove, that [*312] the event, upon which the tenancy is to determine, has happened.

When the tenancy expires by reason of a notice to quit, *the lessor must prove the tenancy of the defendant, the service of the notice and its contents, (and if given by an agent, the agent's authority,)(*d*) and that the notice and the year of the tenancy expire at the same time. When also the notice is for a shorter period than half-a-year, or expires at any other period than the end of the year of the tenancy, it will be necessary to show the custom of the country where the lands lie, or an express agreement, by which such notice is authorised.(*e*)

The tenancy of the defendant is commonly admitted, and may be proved when necessary, if no direct evidence can be given of the demise, by declarations on the part of the tenant, the fact of payment of rent (and it is advisable to give the tenant notice to produce his receipts) or the like.

(*a*) Roe d. West *v.* Davis, 7 East, 363.
(*b*) Fenn d. Thomas *v.* Griffith, 6 Bing. 533.
(*c*) Orrell *v.* Maddok, Runn. Eject. Appen. 458; Doe d. Davey *v.* Oxenden, 7 M. & W. 131.
(*d*) Ante, 89,
(*e*) Ante, 103.

The service of the notice,(*a*) and the authority to serve it, will be proved by the person who delivered it to the tenant; but if there is a subscribing witness thereto, such subscribing witness must also be called,(*b*) although it should happen that he only witnessed the signature of the landlord, and did not deliver the notice himself. The contents of the notice may be proved by a duplicate original, which [*313] should be compared *with the notice actually served, by the party serving it; but if this precaution is not taken, parol evidence may be given of its contents; and it is not necessary, in either case, to give the defendant notice to produce the original in his possession.(*c*)

In a case in which it was proved, that it was the usual practice in the attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service; and on the occasion in question the attorney himself prepared a notice to quit to serve on a tenant, *and took it out with him together with two others prepared at the same time, and afterwards returned to the office and indorsed on the duplicate of each notice a memorandum of having delivered it to the tenant, and the attorney died before the trial, and at the trial two of the notices were proved to have been delivered by him to the tenants on the day when he so took the notices out with him; it was held, that the indorsement made by him on the third notice was admissible in evidence to prove its service.(*d*)

When the notice is given by an agent, it must be shown that he was vested with his authority at the time the notice was given.(*e*) And where two or more joint tenants, &c., are lessors of the plaintiff, and a notice to quit is given by one or more in the name of all, although they all afterwards join in an ejectment, it will not be presumed, from that circumstance, that an authority was originally given by the parties not joining in the notice, to their co-tenants.(*g*) But where a notice to quit was given by the steward of a corporation, it was presumed, inasmuch as he was an officer of the corporation, that he had an authority to give the notice.(*h*)

(*a*) Ante, 92.
(*b*) Doe d. Sykes *v.* Durnford, 2 M. & L. 62.
(*c*) Jory *v.* Orchard, 2 B. & P. 41.
(*d*) Doe d. Patteshall *v.* Turford, 3 B. & Ad. 890.
(*e*) Ante, 88.
(*g*) Ante, 89.
(*h*) Roe d. Dean of Rochester *v.* Pearce, 2 Campb. 96.

When the tenant has been long in possession of the premises, it frequently becomes extremely difficult to prove the time of his original entry; but nevertheless, some evidence must be given, from which the jury may presume that the time of the expiration of the notice and of the year of the tenancy are the same, or the plaintiff will be nonsuited.

If the tenant has been applied to by his landlord respecting the time of the commencement of his tenancy, *and has [*314] informed him that it began on a certain day, and in consequence *of such information, a notice to quit on that day is given at a subsequent period, the evidence is conclusive upon the tenant, and he will not be permitted to prove that in point of fact the tenancy has a different commencement: nor is it material whether the information be the result of design or ignorance, as the landlord is in both instances equally led into an error.(*a*) When also the tenant, at the time of the service of the notice, assents to the terms of it, he will be precluded from showing that it expires at a wrong time. But such assent must be strictly proved; and in a case where the party made no objection to the notice at the time of its delivery, but said, "I pay rent enough already, it is hard to use me thus;" it was held that these circumstances were not sufficient to prevent him from showing the time when the tenancy actually commenced.(*b*)

When a notice to quit upon any particular day, is served upon the tenant personally, if he read its contents, or they be explained to him without any objection being made on his part, as to the time of the expiration of the notice, it will be *prima facie* evidence of a holding from the day mentioned in the notice.(*c*) In like manner, a receipt for a year's rent up to a particular day, is *prima facie* evidence of *a holding from that day.(*d*) But if the notice be not deliv- [*315] ered personally, or be not read over or explained to the party, no such presumption will arise, although a contrary doctrine was formerly maintained.(*e*) When also the notice is to quit generally at the

(*a*) Doe d. Eyre *v.* Lambley, 2 Esp. 635.

(*b*) Oakapple d. Green *v.* Copous, 4 T. R. 361.

(*c*) Thomas d. Jones *v.* Thomas, 2 Campb. 647; Doe d. Clarges *v.* Foster, 13 East, 405; Doe d. Leicester *v.* Biggs, 2 Taunt. 109.

(*d*) Doe d. Castleton *v.* Samuel, 5 Esp. 174.

(*e*) Doe d. Puddicombe *v.* Harris, 1 T. R. 161; Doe d. Ash *v.* Calvert, 2 Campb. 387.

expiration of the current year of the tenancy, &c.,(*a*) no presumption can arise, as to the time of the commencement of *the tenancy, from a personal delivery to the tenant. But where a general notice was delivered on the 22nd of March, to quit at the expiration of the current year, &c., and on the 16th of January following, a declaration in ejectment was delivered to the tenant, laying the demise on the 1st of November, and the tenant on the receipt of this declaration made no objection to the notice to quit, nor set up any right to the possession of the premises, but said he should go out as soon as he could suit himself with another house, it was ruled by Lord Ellenborough, C. J., that the defendant's declaration, when served with the ejectment, was evidence to go to the jury, whether the holding was a Michaelmas holding, and the jury found a verdict for the landlord.(*b*) And in a case where the notice was delivered on Sept. 27, to quit "at the expiration of the term for which you hold the same," which notice was served personally upon the tenant, who observed, "I hope Mr. M. does not mean to turn me out," Holroyd, J., permitted the lessor to prove, that it was [*316] the general custom, in that part of the country *where the demised lands lay, to let the same from Lady-day to Lady-day, and that the defendant's rent was due at Michaelmas and Lady-day respectively, and directed the jury to presume, that this tenancy, like other tenancies in that part of the country, was a tenancy from Lady-day to Lady-day.(*c*)

Where the sole evidence of a tenancy is payment of rent, the person paying is in all cases at liberty to explain the payment, and show on whose behalf it was received.(*d*)

When the ejectment is brought upon a clause of re-entry for non-payment of rent, if the proceedings are at common †law, the lessor must prove the lease, or counterpart,(*e*) and that the rent has been demanded with all the formalities mentioned in a preceding chapter.(*g*) If the case falls within the provisions of the statute 4 Geo. II. c. 28, instead of proving a demand of rent, he must show that six months' rent is in arrear, and that there is not a sufficient distress upon the pre-

(*a*) Ante, 104.
(*b*) Doe d. Baker *v.* Wombwell, 2 Campb. 559.
(*c*) Doe d. Milnes *v.* Lamb, Nottingham Summer Assizes, 1817, M.S.
(*d*) Doe d. Harvey *v.* Francis, 2 M. & R. 57.
(*e*) Roe d. West *v.* Davis, 7 East, 363.
(*g*) Ante, 121.

mises.(*a*) In order to prove the latter fact, evidence must be given that every part of the premises has been searched; and in a case where the party who was about to make the distress, omitted to enter a cottage upon the premises, the court considered the search insufficient.(*b*) But if the lessor show that he was prevented by the defendant from entering on the premises, proof that there was no sufficient distress will be dispensed with.(*c*) If there be a sufficient distress to countervail the arrears of rent, in respect of which the forfeiture is incurred, it will be an answer to the action, although the distress be not sufficient to meet any further arrears remaining due.

*The search must, of course, be made after the time when [*317] the rent became due, and also after the expiration of the time when it was payable to save the forfeiture;(*d*) but it is not necessary for the plaintiff to prove that there was no sufficient distress upon the premises throughout the whole period of time during which the rent has been in arrear. If he proves that on any one day, from the time when the rent became due, to the day of the demise in the declaration, there was no sufficient distress, it will entitle him to a verdict. And even if he proves that there was not a sufficient distress, on some day *after* the day of the demise; as, for example, on *some day* in May, (the demise being laid on May 2,) it will be sufficient *prima facie* evidence to call upon the defendant to show, that there was a *sufficient distress upon the premises within the terms of the proviso.(*e*)

It is not necessary that the amount of rent proved to be due should correspond with the amount stated in the particulars of breaches delivered by the plaintiff.(*g*)

When the ejectment is for the breach of any other covenant, the lessor must show the covenant broken, by the same evidence as in an action of covenant; and if he has been ordered by the court to give to the tenant particulars of the breaches upon which he means to rely, he will be precluded from giving in evidence different breaches from those contained in the particulars. A breach of covenant by mis-

(*a*) Ante, 122.
(*b*) Doe d. Powell *v.* King, Forrest, 19.
(*c*) Doe d. Chippendale *v.* Dyson, 1 M. & M. 77.
(*d*) Ante, 121.
(*e*) Doe d. Smalt *v.* Fuchau, 15 East, 286.
(*g*) Tenny d. Gibbs *v.* Moody, 3 Bing. 3.

management in overcropping, and by deviating from the usual rotation of crops, has been held to be inadmissible in evidence under particulars for breaches, "by selling hay and straw off the land, removing manure, and *non-cultivation*.(*a*)

[*318] *In an ejectment on a proviso for re-entry, for breach of covenant not to assign or let the premises, it was ruled by Lord Alvanley, C. J., that if a person was found in possession acting and appearing as tenant, it was sufficient *prima facie* evidence of an under-letting to call upon the defendant (the lessee) to show in what character such person was upon the premises; and that the declarations of such person were admissible in evidence against the lessee.(*b*) But in a subsequent case, upon similar evidence of possession, (accompanied, indeed, by a declaration of the party that he had taken the premises from a third person, but which does not seem to form the ground of the decision,) Lord Ellenborough, C. J., directed a non-suit; observing, that upon such evidence, **non constat*, that the party was not a tortious intruder, that it was incumbent on the lessor to prove that the lessee had either *assigned* or *let*, and that the evidence produced would not be sufficient, even if the lessee had covenanted *not to part with the possession*.(*c*)

In ejectment against a tenant for a forfeiture, it is a good defence that the landlord, after the execution of the lease, conveyed away his title to the premises by mortgage, although it be not shown that any interest on the mortgage is in arrear, or that the mortgagee has made any claim, or otherwise enforced his rights as against either landlord or tenant.(*d*)

In an ejectment for not insuring, it lies upon the claimant to prove that no insurance has been effected, and the circumstance that defendant refused to show the policy, when the plaintiff required him, and the non-production of it at the trial after notice, are not *prima facie* evidence against him.(*e*)

(*a*) Doe d. Winnal *v.* Broad, 2 M. & G. 523.

(*b*) Doe d. Hindley *v.* Rickarby, 5 Esp. 4.

(*c*) Doe *v.* Payne, 1 Star. 86.

(*d*) Doe d. Marriott *v.* Edwards, 5 B. & A. 1065.

(*e*) Doe d. Bridger *v.* Whitehead, 3 Nev. & P. 557. The difficulties attendant on the proof that no insurance has been effected, are, from the great number of insurance offices, almost insuperable. It is prudent, in order to avoid these inconveniences, to limit the covenant to an insurance in some particular office.

If the claimant is the assignee of the reversion, after proving the forfeiture, evidence must be given that he was entitled to the reversion at the time the forfeiture was committed,(*a*) and if possible of the mesne assignments from the original lessor. These mesne assignments, however, will be presumed, if the original lease be for a long term, and the possession of the assignee has continued for a considerable time.(*b*)

We must now consider the cases in which questions have *arisen as to the right of tenants to dispute their landlord's title.

It may be laid down as a general rule, that a person defending as landlord is bound by the same estoppels as the tenant himself, and that a party who gets possession of premises from the lessor of the plaintiff, by any fraud or trick upon him, cannot set up his own title, or a title in a third person, in answer to the action.(*c*)

A party also who defends as landlord is estopped from objecting that the occupiers of the premises, who have suffered judgment to go by default, are tenants to the lessor, and have not received notice to quit from him.(*d*)

The lessor of the plaintiff had demised the premises from year to year to a mining company, and had given to them a notice to quit on the day of the demise; he was a partner in the company, and the defendant, who was another partner in the company, defended on their behalf. The defendant was estopped from disputing the title of the claimant, although he had admitted, in an answer in Chancery which was in evidence, that he had no legal title to the premises.(*e*)

S., the husband of *A.*, being in possession of lands, made a conveyance of them in fee; but it was verbally agreed, between him and the purchaser, that during the joint lives of the purchaser and *S.*, the possession of *S.* should not be disturbed. The purchaser died, and *S.* re-

(*a*) Ante, 55, 148.

(*b*) Earl d. Goodwin *v.* Baxter, Blk. 1228.

(*c*) Doe d. Knight *v.* Lady Smythe, 4 M. & S. 447; Doe d. Earl Manvers *v.* Mizim, 2 M. & R. 56; Doe d. Mee *v.* Litherland, 4 Ad. & Ell. 784; Doe d. Bullen *v.* Mills, 2 Ad. & Ell 17; Doe d. Johnson *v.* Baytup, 3 Ad. & Ell. 188.

(*d*) Doe d. Davis *v.* Creed, 5 Bing. 327.

(*e*) Francis *v.* Doe d. Harvey, 4 M. & W. 331.

ceived notice to quit. He also *died, the notice having expired, and *A.*, the widow, retained possession. In ejectment brought against her by the purchaser's representatives, it was held, that she could not set up against them the title of a party to whom her husband, before the above-mentioned conveyance, had given a mortgage for 1000 years.(*a*)

H., having no title was let into possession by the owner, and L. came to reside with and attend upon him. H. afterwards died, having devised the premises to the lessor of the plaintiff, and continued to reside. Upon ejectment brought, the defendants, (professing to have a claim under the original proprietor,) defended as landlords, but at the trial gave no evidence of title in themselves; it was held, that L., having come into possession under H., the defendants were estopped from showing the circumstances under which H. entered.(*b*)

G. demised premises to D., who entered and paid rent. During the term, a third party, T., disputed G.'s title, and they agreed to be bound by the opinion of a barrister, who decided in T.'s favor. G. therefore delivered up the title deeds, and permitted T.'s attorney to tell D., the tenant, that he must in future pay the rent to T. as his landlord. It was held, that G.'s claim of title as landlord to D. had expired; that his conduct amounted to an admission of that fact; and that D. was not estopped from alleging it.(*c*)

Previous to 1812, a person built a house on a piece of waste ground, and before he acquired a title to it, gave up possession to the tenant of the adjoining land, who held it under a lease granted in 1812. The latter let the premises to the defendant. It was held, in ejectment by the landlord of the adjoining land, that the defendant was estopped from *denying the title of the tenant, and the tenant from disputing that of the landlord.(*d*)

A. demised to B., and afterwards being embarrassed, assigned to C., and requested B. to attorn to C., (suppressing the facts of his insolvency,) which B. accordingly did, and subsequently agreed with C. to give up possession at a particular day.—A. became bankrupt, B. remaining

(*a*) Doe d. Leeming *v.* Skirrow, 7 Ad. & Ell. 157.
(*b*) Doe d. Willis *v.* Birchmore, 9 Ad. & Ell. 662.
(*c*) Downs *v.* Cooper, 2 Q. R. R. 256.
(*d*) Doe d. Wheble *v.* Fuller, 1 Tyr. & G. 17.

in possession, and C. brought an ejectment upon the agreement. The assignees defended as landlords. It was held, that these acknowledgments did not estop B., or the assignees as representing him, from contesting C.'s title; such acknowledgments having been made in consequence of A.'s representations, in which he suppressed the facts rendering the assignment invalid.(*a*)

Thirdly, when the defendant has been let into possession by the owner, under circumstances by which the relationship of landlord and tenant, has not been constituted.

It is impossible to point out the evidence requisite in all the various cases, arising under this division of the subject. Each case must depend on its own peculiar circumstances, and it is enough, therefore, to say generally, that the claimant must give evidence of the circumstances under which possession was taken, and that the defendant's right to such possession has ceased. If, for example, he was let into possession pending a negotiation for a purchase, it must be proved that he was so let into possession, and that the negotiation has been broken off. If he took possession under a void lease or agreement, the instrument must be produced and proved. If by leave and license, or as tenant at will, that the license has been revoked, or the will determined by demand of possession or otherwise, and so forth; and this general rule must be always attended to, *namely, that the right of possession in the defendant must be terminated before the day of the demise in the declaration.

*Lastly; Of the evidence on the part of the defendant.[1] [*319]

(*a*) Doe d. Plevin *v.* Brown, 7 Ad. & Ell. 447.

[1] To the rule that a plaintiff in ejectment must recover on the strength of his own title, there are exceptions: as where a party is in possession under the plaintiff as tenant, or under contract of purchase; in such cases the plaintiff is not required to make proof of his title. Tilghman et al. *v.* Little, 13 Illinois Rep. 239.

In ejectment by an heir-at-law, against a defendant who claims under a lease granted by an ancestor of the lessor of the plaintiff; if such lease, being in the hands of the lessor of the plaintiff, be produced at the trial by him, on notice, it may be given in evidence, without proof of its execution by the subscribing witness. Doe ex dem. Tindale *v.* Hemming et al., 2 Carr. & P. Rep. 462.

One in possession, though of a part only of the premises in ejectment, is not a competent witness for the defendant. Jackson ex dem. Church, *v.* Hills, 8 Cow. Rep. 290.

A party in possession may protect himself under a title acquired by a person under whom

The principle that a claimant in ejectment must recover on the strength of his own title, is now so clearly established that little can be

he claims, subsequently to his coming into possession. Jackson ex dem. Humphrey et al. *v.* Given et al. 8 Johns. Rep. 137.

A., a patentee of land, conveyed to B.; afterwards, C. purchased the same lot of a person pretending to be the original patentee, and fraudulently executed a deed for the lot to C., who afterwards conveyed it to D., who sold it to various persons, who took possession under him; the real patentee, during the continuance of the adverse possession, executed another deed of the same lot to W., which was first recorded; and D. purchased the title of W., and took a deed from him, which was also recorded. B. brought an action of ejectment against the person in possession under D., and it was held, that B. could not set up the adverse possession of D., to defeat W.'s purchase from the real patentee, and that the persons holding under D., had a right to protect themselves by the title of W., equally, as if they had purchased it of W. Ib.

A. claimed title under J. S., and B. also claimed title under a deed from J. S. and others, as trustees of the town of R., settling the boundaries of certain disputed premises: held, that J. S. was bound, in his individual capacity, to the line so agreed to and settled by him as a trustee, and which he had covenanted to maintain, and that such deed of settlement, being prior to the deed to A., was a bar to his claim. Wood ex dem. Elmendorf *v.* Livingston, 11 Johns. Rep. 36.

The defendant derived his title from A., who derived from B.; held, that the defendant could not give in evidence the declarations of A. and B., as to the loss of the deed from B. to A., nor could he prove a parol exchange between B. and A. Jackson ex dem Watson *v.* Cris, 11 Johns. Rep. 437.

Where a person having no title to land, conveys to another, and afterwards purchases a title to the same land, he is estopped from maintaining an action against his grantee for the land, but the title subsequently acquired will enure to the benefit of his grantee, and in confirmation of his title. Jackson ex dem. Stevens *v* Stevens, 13 Johns. Rep. 316; same point, Jackson ex dem. Preston *v.* Smith, 13 Johns. 406.

A person in possession of land, claiming title, may purchase in an outstanding title, to protect his possession. Jacksom ex dem Preston *v.* Smith, 13 Johns. Rep. 406.

A tenant cannot set up an outstanding title in a third person, holding directly by letters patent from the state in an action of ejectment brought against him by his landlord or those deriving title from the landlord. Jackson *v.* Harper, 5 Wen. 246.

The acceptance of a lease from such third person is a fraudulent attornment. Ib.

Where the title of the landlord has expired, the tenant may show an outstanding title against him. Jackson *v.* Rowland, 6 Wen. 666.

It is only in the case of a resulting trust that the estate of a *cestui que trust* can be set up to bar a recovery by the person having the legal estate. Jackson *v.* Leggett, 7 Wen. 377.

A conveyance by a lessor in ejectment, after suit brought, to third persons in trust is no bar to a recovery. Ib.

A party in possession of lands, recognizing the title of a claimant, and agreeing to purchase, may subsequently deny such title, set up title in himself and show that his acknowledgment was produced by imposition, or made under a misapprehension of his rights. Jackson *v* Spear, 7 Wen. 401.

But a party entering into possession under an agreement to purchase, cannot dispute the title of him under whom he enters, until after a surrender of his possession. Ib.

A defendant cannot read a subsequent deed to show title out of the lessor, without showing that the lessor holds under it. Blight *v.* Atwell, 7 Monroe, 568.

said respecting the evidence necessary on the part of the defendant. The lessor of the plaintiff must always, in the first instance, make out

A defendant who has entered forcibly into the premises in question, is not debarred by such forcible entry from showing title in himself. Jackson v. Stansbury, 9 Wen. 201.

The remedy of the party dispossessed, if any, is under the statute of forcible entry and detainer. Ib.

A party in possession of lands, claiming the same under a warranty deed from a stranger, is estopped from saying that he holds as tenant in common with the plaintiff. Siglar v. Van Riper, 10 Wen. 414.

And, even where he hold as tenant in common, if he has denied the plaintiff's title when in possession, the plaintiff can recover. Ib.

Though parol declarations of tenancy have been admitted, yet, parol declarations are inadmissible evidence to defeat or take away a title; it being contrary to the statute of frauds. Jackson ex dem. White v. Carey, 1 Johns. Rep. 302.

A party in possession of lands, acknowledging the title of another, is not estopped from subsequently disclaiming holding under such title, if the original entry was not under the person in whom the title is acknowledged; nor is any other person, deriving the possession from such tenant, estopped by such acknowledgment. Jackson v. Leek, 12 Wen. 105.

The parol admission of a plaintiff in ejectment, that the defendant is the owner of the premises claimed, is competent evidence, where the plaintiff has succeeded in showing title to only one-half of the premises. Ib.

An entry by a defendant, under a recovery in an action against a person in possession, is sufficient to bar a recovery of the premises in a subsequent action by the plaintiff, who relies merely upon a prior possession. Whitney v. Wright, 15 Wen. 171.

A possession under an executory contract renders void a deed executed under a title adverse to such possession; and, evidence of want of confidence by the possessor in the title under which he holds, and of belief in the better title of the individual executing such deed, does not estop him from objecting to the validity of the deed. At all events, he is at liberty to show that he possessed the premises under a claim of title adverse to that of the grantor of the deed. Ib.

A mortgagor, in an action against him for the recovery of the premises, is estopped from denying that he had title at the time of the execution of the mortgage; nor is he permitted to set up title in a stranger. Barber v. Harris, 15 Wen. 615.

In an action of ejectment, brought by the grantee, in a mere voluntary conveyance, against the heir of the grantor, the latter cannot set up the want of consideration, in bar of the recovery; for, the party making a voluntary conveyance, and his heirs, are bound by it. Jackson ex dem. Malin v. Garnsey, 16 Johns Rep. 189.

The heir of a grantor cannot take advantage of a judgment against himself, under which the land conveyed by his ancestor had been sold, and set up, as an outstanding title to defeat the grantee's action; for, such a sale operates only on the interest which he had in the land, which was nothing more than a naked possession. Ib.

In ejectment against a person who has forcibly entered upon and taken possession of land; it seems, that the defendant is not precluded from setting up a title in himself or a third person, in bar of the action. Jackson ex dem. Seelye v. Morse, (Per Spencer, J.,) 16 Johns. Rep. 197.

Where the lessor of the plaintiff, who became the purchaser of the title of a mortgagor in possession of land, under a judgment and execution, had covenanted with the defendant to postpone the sale under the execution for two years, it is no defence in an action of ejectment, that the sale to the lessor had been made before the expiration of the two years

a clear and substantial title to the premises in question;[1] and the defendant's evidence is altogether confined to falsifying his adversary's proofs, or rebutting the presumptions which may arise out of them. He need not show that he has himself any claim whatever to the premises, nor give evidence of a title in a third person; it is sufficient if he make it appear to the jury, that a legal title does not subsist in the plaintiff's lessor. Thus, when the lessor claims as heir, he may show a devise by the ancestor to a stranger;[2] that by a particular custom,

and in violation of his covenant. Jackson ex dem. Randell et al. v. Davis, 18 Johns. Rep. 7.

An equitable title is not available in an action of ejectment, to defeat the legal title. The latter alone is in question. Sinclair v. Jackson ex dem. Field, (in error,) 8 Cow. Rep. 543.

Proof by the defendant of the confirmation of a grant to his grantor, without showing a location, will not authorize a verdict for the defendant. Waddingham v. Gamble, 4 Missouri Rep. 465.

If no evidence be given to prove the possession of one of the defendants in ejectment, the court may direct the jury to find him not guilty, that he may be examined as a witness for the other defendants. Lessee of Leaming v. Case, Circ. Ct. U. S. P., Oct. 1821. MS. (Cited in Coxe's Digest, 272.)

Where, in ejectment, the attorney for the lessor of the plaintiff obtained from one of the defendants, (the tenant in possession,) a lease of the premises granted to him, for a term not then expired, in order to prevent the defendant's setting it up to defeat the action: held, that he thereby recognized it as a valid instrument, and when produced, in pursuance of notice from the defendants, it might be read without calling the subscribing witnesses to prove the execution by the grantor of the lease. Doe ex dem. Tyndale v. Hemming et al., 6 Barn. & Cress. Rep. 28.

Defendant may show that the patent, under which the plaintiff claims, was obtained contrary to law. Hambleton v. Wells, 4 Call. 213. In ejectment on a mortgage, the defendant may show that the mortgage was obtained from him fraudulently. Deen v. Moore, 2 South. 470; Torrey v. Beardsley, 4 Wash. C. C. Rep. 242.

[1] Articles of agreement for sale of land, stipulating that title shall be made on payment of the money, do not prevent a recovery in ejectment, there being no proof of payment. Anonymous, 1 Hayw. Rep. 331.

The plaintiff in ejectment, in deducing his title to the land in question, gave in evidence a grant for the land, in 1671, to T. P. and R. B., and that T. R. was seised and possessed of the land, and died so seised, 1745, having, by his will, in 1744, devised the land in tail to his son, F. R., after his mother's death. F. R., in 1780, being in possession, conveyed the land to B. G., who died intestate in 1800, leaving six children, one of whom conveyed all his interest to the lessor of the plaintiff. Held, that the life estate, set up to defeat the action, must, from the length of time that had elapsed, (1746 to 1808,) be considered as having expired before the ejectment was brought, and that the plaintiff was entitled to recover. Stevenson v. Howard, Survivor of Pennington's lessee, 3 Harr. & Johns. Rep. 554.

[2] In ejectment, by the heirs at law of C., against L., who had taken a lease from the ancestor, the heirs are not bound to produce the will of the ancestor, supposing that it can be shown that he made one; but the defendant, if he mean to bar the title of the heir at

another, and not the claimant, is the heir; that the claimant is a bastard; or any other circumstances which will invalidate his title. In like

law, must show, affirmatively, a devise of the premises in question. Brandt ex dem. Cuyler et al. v. Livermore, 10 Johns. Rep. 358.

Where a party had been in possession of land for thirty-five years, claiming it as his own, and had built a barn upon it; and, where the owner, who resided within sixty miles of the premises, left the country for a period of twenty years, and, after his return, allowed eighteen years to elapse before bringing his suit, and the original letters patent for the land were found in the possession of the occupant: held, that the facts and circumstances warranted the presumption of a conveyance to the occupant. Jackson v. Warford, 7 Wen. 62.

The provision, respecting payment for improvements in the act respecting the military tract, is retrospective, exclusively. Jackson v. Caywood, 7 Wen. 246.

An owner of land is bound by a division line recognized by his surveyor as correct; where the owner has given deeds, in conformity to a map and field book made by the surveyor, and no efficient attempt is made for the period of twenty-two years to correct the line. M'Cormick v. Barnum, 10 Wen. 104.

It is a settled rule, that a conveyance is to be construed in reference to its distinct and visible locative calls, as marked or appearing upon the land, in preference to quantity, course, distance, map, or anything else. Van Wyck v. Wright, 18 Wen. 157.

The original proprietors, as between themselves, can correct any mistake, which happened in the original survey and subdivision of the tract; but, after third persons have acquired rights in conformity to the survey, as actually made, the error cannot be corrected to their prejudice, without their consent. Ib.

Evidence of the acts of the lessor of the plaintiff, which tend to conclude him, and those who derive title under him, is admissible. Jackson ex dem. Goodrich et al. v. Ogden, 4 Johns. Rep. 140.

Showing a line of boundary, and erecting a fence thereon, the party, at the same time, asserting his right to have more land, will not conclude him from afterwards contesting that boundary. Jackson ex dem. Zimmerman v. Zimmerman et al, 2 Caines' Rep. 146.

A possession of forty years, in conformity to a division line, will not be disturbed, on the ground that the line was run erroneously. Jackson ex dem. Nellis v. Dysling, 2 Caines' Rep. 198.

Hearsay evidence is sufficient to prove a pedigree. Jackson ex dem. Ross v. Cooley, 8 Johns. Rep. 128.

The acknowledgment of a deed from persons subscribing themselves as heirs, taken according to the directions of the act, before the mayor of London, is also a circumstance of weight in evidence of pedigree. Ib.

In an action of ejectment, the lessors of the plaintiff resided in England, and claimed to be heirs of the person who died seised of the land in question; a witness here deposed, that he knew the ancestor and had charge of the land, as his agent, and corresponded with him, and, after his death, with the lessor, who sent him a power to act for him, as heir and devisee, and that his information was also derived from persons acquainted with the family of the lessors: held, that this was sufficient evidence, *prima facie*, of pedigree of heirship, to go to the jury. Ib.

Though hearsay and general reputation may be received as evidence of pedigree, yet, where the witnesses are not connected with the family, have no personal knowledge of the facts of which they speak, and have not derived their information from persons connected, or particularly acquainted with the family, but speak generally of what they have heard and

manner when the lessor claims as devisee, the defendant may show that the will was obtained by fraud; that it was not duly executed; that the testator was a lunatic; and so forth.[1] And as the same principle holds, whatever be the title of the claimant, any particular directions respecting the defendant's proofs are altogether unnecessary. It is sufficient to observe generally, that the defendant's evidence entirely depends on the nature of the proofs advanced by the plaintiff's lessor, and need in no case to be extended beyond the rebuttal of them.

understood, such evidence is not sufficient for that purpose. Jackson ex dem. Garland v. Browner, 18 Johns. Rep. 37.

Hearsay is admissible evidence of the death of a person. Jackson ex dem. Minor v. Boneham, 15 Johns. Rep. 226.

[1] But an equitable lien or mortgage cannot be set up at law as a legal estate, to defeat a recovery in an action of ejectment. Jackson ex dem. Lowell v. Parkhurst, 4 Wen. Rep. 369.

The lessor of the plaintiff in ejectment died pending the action, and his heirs at law were made parties in his place, without objection, and the cause continued several terms, and the plots amended. Held, that it was not competent for the defendant to defeat the action by giving evidence that one of the heirs was an infant when she was made a party; and, that evidence that she was an infant at the time of the trial, would not entitle the defendant to a verdict against the other heirs who were of full age. James et al. Lessee v. Floyd, 1 Harr. & Gill's Rep. 1.

Possession is presumptive evidence of right, and a defendant in ejectment cannot be deprived of his possession by any person but the rightful owner of the land, he who hath the *jus possessionis*. Hall v. Gittings, jr. lessee, 2 Harr. & Johns. Rep. 122.

Where defendant demurs to the evidence of the plaintiff, it is not necessary it should be stated in the demurrer that the lessor of the plaintiff was in possession at any time within twenty years, to entitle him to judgment. Lessee of Bayard v. Colfax et al., Circ. Ct. U. S., N. J., April, 1821. MS. (Cited in Coxe's Digest, 272.)

A conveyance to the defendant may be read in evidence, though executed since issue joined. Carter's Lessee v. Parrott, 1 Tenn. Rep. 237.

*CHAPTER X.

Of the Trial and Subsequent Proceedings.

*THE claims of the parties being prepared for the decision [*320] of a jury, by means of the fictions, conditions, and proofs, described in the preceding chapters, the trial with its incidents, and the subsequent proceedings, will now occupy our attention.[1]

The death of the lessor of the plaintiff, although he be only tenant for life, will not abate the action,[2] nor can it be pleaded *puis darrein*

[1] The New York Code (sec. 455) provides that the general provisions of the Revised Statutes relating to actions concerning real property, shall apply to actions brought under the Code, according to the subject matter of the action, and without regard to its form.

[2] The Revised Statutes of New York (part 3, chap. 5, tit. 1, secs. 24, 25,) contain the following enactments:

"Sec. 24. If the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be entered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed; and that, as to the premises claimed, the defendant go thereof without day.

"Sec. 25. The action of ejectment shall not be abated by the death of any plaintiff, or of one of several defendants, after issue and before verdict or judgment; but the same proceedings may be had as in other actions, to substitute the names of those who may succeed to the title of the plaintiff so dying, in which case, the issue shall be tried as between the original parties; and in case of the death of a defendant, the cause shall proceed against the other defendants." See N. Y. Code, sec. 121.

"The death of the lessor of the plaintiff does not abate the suit." Austin v. Jackson ex dem. Kimber et al., 1 Wen. Rep. 27. Same point, Frier et al. v. Jackson ex dem. Van Alen, (in error,) 8 Johns. Rep. 495; Doe ex dem. Marston et al. v. Butler, 3 Wen. Rep. 153; Robertson v. Morgan, 2 Bibb's Rep. 148.

Conveyance by lessor, after date of demise, whether to a stranger or defendant, does not abate the suit. Hubbard v. Trustees of Bradstown, 2 Marsh. Rep. 31. (New Series.)

And where the lessor of the plaintiff was entitled to a life estate in the premises, but the defendant had the reversionary interest therein; and pending the suit, the life estate terminated by the death of the lessor; the court said, "The plaintiff, then, has no title to turn the defendant out of the possession; but he has a title to the mesne profits and the costs of this suit, and must therefore have judgment to enable him to recover them." There must be a judgment for the plaintiff, with a perpetual stay of the writ of possession. Jackson ex dem. Henderson v. Davenport, 18 Johns. Rep. 295, 302.

continuance; because the right is supposed to be in his lessee, (the plaintiff,) who may proceed for the damages occasioned by the supposed ouster, although he cannot obtain possession of the land;(*a*) but a trial of this nature is unknown in practice, for the damages in ejectment are only nominal, and if the plaintiff be non-suited from the refusal of the defendant to appear at the trial, the executor of the lessor will not be entitled to his costs, for the consent rule is merely personal.(*b*)

(*a*) Thrustout d. Turner *v.* Grey, Stran. 1056.

(*b*) Thrustout *v.* Bedwell, 2 Wils. 7.

But, on a motion for judgment, as in case of non-suit, for not proceeding to trial pursuant to stipulation, the death of the lessor, after the stipulation, and previous to the circuit at which the cause ought to have been tried, was offered in excuse: the court said, "The excuse offered will be received so far as to permit a new stipulation, on payment of costs; otherwise, the motion must be granted." Austin v. Jackson ex dem. Kimber et al., 1 Wen. Rep. 27.

Ejectment abates by the death of the lessor of the plaintiff. Howard v. Gardiner, 3 Har. & M'Hen. Rep. 98.

"The defendant may move to have the demise of a lessor, who died before the commencement of the action, struck out of the declaration." Per Sutherland, J., delivering the opinion of the court. Doe ex dem. Marston et al. v. Butler, 3 Wen. Rep. 153. Same point, Jackson ex dem. Low et al. v. Reynolds, 1 Caines' Rep. 20; Jackson ex dem. Butler et al. v. Ditz, 1 Johns. Cas. 392; Jackson ex dem. Aikens et al. v. Bankcroft, 3 Johns. Rep. 295.

And this motion may be made after the defendant has entered into the consent rule, Jackson ex dem. Low et al. v. Reynolds, 1 Caines' Rep. 20.

It seems that a plaintiff in ejectment cannot recover on a demise from a person who is dead at the time of action brought. See v. Greenlee, 6 Munf. Rep. 303.

An ejectment does not abate by the death of the lessor of the plaintiff. Kinney v. Beverly, 1 Hen. & Munf. Rep. 531.

An appeal from a judgment in ejectment does not abate by the death of the lessor of the plaintiff, notwithstanding such lessor claimed the land for life only. Medley v. Medley, 3 Munf. Rep. 191.

The death of one of the lessors of the plaintiff, in an action of ejectment, may be suggested after the jury are sworn, and his heir, &c., need not appear, or be made a party. Howard v. Moale et al. Lessee, 2 Har. & Johns. Rep. 246.

Parties succeeding to the title of a plaintiff in ejectment, dieing after issue and before verdict, may be substituted; but it must be by *scire facias*, and not by motion. James v. Bennett, 10 Wen. 540.

In trespass to try titles against two, although the plea be joint, the jury may find against one, and not guilty as to the other. Foster v. Foster, 2 Stewart's Rep. 356.

In an action against several defendants who pleaded jointly, a judgment of non-suit may be given against the plaintiff, after the death of one of the defendants, without a substitution of his representatives. Mickle v. M'Farland, 7 Watts' Rep. 406.

A juror, not interested in the ejectment to be tried, nor in any land, the title to which depends on the principles to be settled in it, is not liable to challenge for cause, on the ground that he is interested in another tract, held by the plaintiff under the same title as that now in suit. Gratz et al. v. Benner, 13 Serg. & R. Rep. 110.

*If the defendant refuses at the trial to appear, and confess [*321] lease, entry, and ouster, the plaintiff must be non-suited, unless the action be at the suit of a landlord against his tenant, in which case it is optional with the lessor of the plaintiff to be non-suited, or proceed with the trial. If he adopt the latter course, he must produce the consent rule and undertaking of the defendant, (which by stat. 1 Geo. IV. c. 87, s. 2, is made evidence of lease, entry, and ouster,) which will entitle him, *after proof of his right to the demised premises, to recover the mesne profits, accruing from the day of the determination of the tenant's interest to the time of the verdict, or to some preceding day to be specially mentioned therein.

The landlord has also, by the same statute, a like privilege with regard to the recovery of the mesne profits, in case of the appearance of the tenant at the trial; but the statute does not extend to cases in which the relation of landlord and tenant does not exist.

If there be two defendants, one of whom defends as landlord, and the other as tenant, and they defend by different counsel and attorneys, but the tenant claims no title but what he derives from the landlord, one counsel only will be permitted to address the jury, but both may cross-examine and also call witnesses.(*a*)

In addition to the general authority given to the presiding judge in all actions, by stat. 1 Wm. IV. c. 70, to grant certificates for immediate execution, he is authorised by the stat. 1 Geo. IV. c. 87, s. 32, in all cases of trials of ejectments, when the verdict shall pass for the plaintiff, or he shall be non-suited for want of the defendant's appearance to confess lease, entry, and ouster, to certify on the back of the record that a writ of possession ought to issue immediately, and such writ shall thereupon issue.(*b*)

*The judge is also *authorised* when the rule required by stat. [*322] 1 Geo. IV. c. 87, s. 1, has been entered into by the defendant,(*c*) to stay the execution of the judgment absolutely, until the fifth day of the ensuing term, if he shall think the finding of the jury was contrary to evidence, or that the †damages were excessive; and is *com-*

(*a*) Doe d. Hogg *v.* Tindale and another, 3 C. & P. 565.
(*b*) Appendix, No. 37.
(*c*) Ante, 223.

pelled so to stay the execution, upon the requisition of the defendant, upon his undertaking to find, and within four days from the trial actually finding security, by the recognizance of himself and two sufficient sureties in such reasonable sum as the judge shall direct, not to commit any waste or wilful damage, or sell, or carry off any standing crops, hay, straw, or manure, from the premises, from the day of the verdict until the day of execution.(*a*)

The omission of the date of the year of the demise cannot be amended at *nisi prius*, under stat. 3 & 4 Wm. IV. c. 42, s. 23, because it is not a question of variance between the declaration and the proof, for the day in the declaration is applicable to that day in any year, and it is, if anything, a defect in the declaration itself. Nor is such an omission a ground of non-suit.(*b*)

Two cases only are reported, as to the rules by which the judge at *nisi prius* should be guided in granting amendments under the above statute. In one of them in which the ejectment was brought on a forfeiture, and the amendment asked was to correct a mis-description of the parish, Parke, J., allowed the amendment, and intimated a strong opinion that "parties must not come down to trial on the ground that there was a variance in the record, which they supposed a judge would not rectify."(*c*) In the other case two tenants in common had declared on a joint demise, and Taunton, J., in answer to an application for leave to amend by substituting several demises, refused to allow the amendment, declaring that it was one which he had not authority to make, being in a particular way material to the merits of the case.(*d*)

*When the plaintiff is non-suited, from the defendant's refusal to appear and confess, the cause of the non-suit should be specially indorsed upon the *postea*, in order to entitle the plaintiff to have his costs taxed and allowed, upon the consent rule;(*e*) and also to enable him (in case

(*a*) 1 Geo. IV. c. 87, s. 3.
(*b*) Doe d. Parsons *v.* Heather, 8 M. & W. 158.
(*c*) Doe d. Marriott *v.* Edwards, 1 M. & Rob. 319.
(*d*) Doe d. Poole and another *v.* Errington, 1 M. & Rob. 343.
(*e*) Ante, 223.

the judge should refuse under stat. 1 Wm. IV. c. 70, s. 38,) to have judgment entered against the casual ejector.(*a*)[1]

With respect to the time of entering this judgment, a considerable difference prevails between the practice of the court of King's Bench, and of the Common Pleas: the judgment being signed, and the execution *taken out, in the latter court, immediately af- [*323] ter the entering of the non-suit, and, in the former, not until the day in bank when the *postea* should be returned;(*b*)[2] and it is to be regretted that two of the superior courts should differ on a point so essential to the regular administration of justice.

If there be several defendants, and some of them refuse to appear and confess, it is the practice to proceed against those who do appear, and enter a verdict for those who do not, indorsing upon the *postea*, that such verdict is entered for them, because they do not appear and confess; and the plaintiff's lessor will then be entitled to his costs against such defendants, and to judgment against the casual ejector for the lands in their possession.(*c*)[3]

(*a*) Turner *v.* Barnaby, Salk. 259; Appen. No. 33.

(*b*) Doe d. Palmerston *v.* Copeland, *et* Throgmorton d. Fairfax *v.* Bentley, 2 T. R. 779; Doe d. Davies *v.* Roe, 1 B. & C. 118.

(*c*) Claxmore *v.* Searle, Lord Raym. 729; B. N. P. 98. Formerly, if some of the defendants did not appear, the plaintiff was non-suited as to all, because *all* the defendants not admitting *the demise*, he could not maintain his declaration. The present practice was adopted in the reign of William III. (Haddock's case, 1 Vent. 355.) Fagg *v.* Roberts, 2 Vent. 195.

[1] Where in ejectment, the tenants in possession, having undertaken to appear, enter into the consent rule, plead *instanter*, and take short notice of trial, made no defence at the trial, but sued out a writ of error when judgment was signed, the court allowed the lessor of the plaintiff to take his judgment against the casual ejector. Doe ex dem. Morgan *v.* Roe, 2 Bing. Rep. 169.

[2] Where a plaintiff in ejectment has been non-suited, the defendant not having appeared to confess lease, entry and ouster, judgment may be regularly signed on the first day of the ensuing term and writ of possession issued on the same day, although the *postea* be not delivered over at the time by the associate, to the attorney for the plaintiff. Doe ex dem. Davies et ux. *v.* Roe, 1 Barn. & Cress. 118.

[3] Where two or more persons, holding by separate and distinct possessions different parts of the same tract, are united in the same action, jointly enter into the same common rule, and plead jointly, judgment may be given against them separately if their separate possessions are found by a jury; and if their separate possessions are stated in a demurrer to evidence, the law is the same. Lessee of Bayard *v.* Colfax et al. Circ. Ct. U. S. N. J. April, 1821; MS.; (cited in Coxe's Digest.)

If there be three defendants in the ejectment who appear at different times; the first

If there be any material variance between the issue and the *record, it seems that the defendant should nevertheless appear at the trial, and afterwards move the court to set aside the verdict for the variance;(*a*)[1] because if he do not appear, he is out of court, and cannot afterwards properly move to set aside the non-suit; yet, upon a motion of this nature, the court did, in one case, grant the rule upon payment [*324] of *costs,(*b*) and in another case stayed the proceedings.(*c*)

If the demise should be laid on a day not come at the time of the trial, the defendant must notwithstanding appear and confess, as the plaintiff would otherwise be non-suited, and entitled, under the consent rule, to judgment against the casual ejector.(*d*)

If the property litigated be of great value, and difficulties are likely to arise in the course of the trial, the court will grant a trial at bar; and the motion for this purpose may be made by either party. But the mere value of the premises,(*e*) or the probability of a protracted trial, will not be sufficient to induce the court to grant the application; *difficulty* must concur; and therefore the motion must be supported by affidavits stating the value *per annum* of the estate, and the particular cir-

(*a*) Ante, 230.
(*b*) Jones d. Thomas *v.* Hengest, Barn. 175.
(*c*) Law *v.* Wallis, 1 Barnard, 156.
(*d*) Anon., Ld. Raym. 798; Small d. Baker *v.* Cole, Burr. 1159.
(*e*) Lord Sandwich's case, Salk. 648.

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pleads, and, as to him, issue is joined; the second is admitted a defendant, but does not plead; the third pleads but no issue is joined. In such state the cause is tried; and a verdict and judgment given for the plaintiff. This is not error notwithstanding there was no plea for the second defendant, nor issue as to the third. Hambleton *v.* Wells, 4 Call's Rep. 213.

Where, of two defendants, one appeared and pleaded to issue, but the other disclaimed; held that the cause was not at issue as to both. Bratton *v.* Mitchell, 5 Watts, 69.

Two defendants sued jointly cannot enter into separate consent rules in the name of each alone. Jackson *v.* Travis, 3 Cowen, 356.

Defendants in ejectment taking a joint defence cannot be permitted at the trial to sever their defence. Carroll *v.* Norwood, 1 Har. & J. Rep. 167.

[1] Amendment by inserting the defendant's name in the *nisi prius* record, in the place where it is usually inserted before the allegation of entry and ouster, the omission being by mistake. Jackson ex dem. Young *v.* Young, 1 Cow. Rep. 131.

This was done after a non-suit at the circuit, for the defendant's not appearing, &c. Ib.

And though the defendant swear to merits in such a case, the court will not relieve, unless he excuse his default. Such an omission is no irregularity. It is matter for motion in arrest, or error, and the record is not void, but voidable, and may be amended. Ib.

cumstances which render the trial at bar necessary; as that the title of the lessor of the plaintiff will depend on an intricate course of descent or the legal operation of deeds, and that various points of law, and other questions, will necessarily arise at the trial; and in some authorities it is laid down that it is not sufficient to swear generally, that the cause is expected to be difficult, but that the expected difficulty ought to be pointed out;(*a*) and a trial at bar has been refused, on the *mere allegation of length, and probable questions of difficulty in a case respecting a pedigree.(*b*) [*325]

It has also been said, that the rule is not to allow a trial *at bar, unless the yearly value of the land amounts to a hundred pounds.(*c*) [*325]

In other actions, a rule for a trial at bar is never granted before issue joined; but as the issue in ejectment is very seldom joined until after the end of term, when it would be too late to make the application, the motion in this action may be granted even before appearance.(*d*)

As the granting of a trial at bar is a *favor*, the courts exercise a power of annexing conditions to the grant. Thus, where the lessor of the plaintiff was unable to bear the expense, and one of his witnesses was above eighty years of age, the court imposed upon the defendant the condition, *if he succeeded, he should only have *nisi prius* costs, but if the lessor succeeded he should have bar costs, the old witness to be examined on interrogatories, and her deposition read, in case of her death before trial. It was also made part of the rule, that the cause should be tried by a Middlesex jury, instead of one from Norfolk, where the premises were situated.(*e*) And in another case, where the lessor had had a rule for a trial at bar, but having laid the demise by a wrong person, had discontinued the action, and brought a new ejectment; the court would not grant him a second rule for a trial at bar, until he had paid the costs of the former ejectment.(*g*) [*326]

(*a*) Rex *v.* Burgesses of Cærmarthen, Say, 79; 2 Lil. P. R. 740; Goodright *v.* Wood, 1 Barnard. 141.

(*b*) Tidd, 768.

(*c*) Goodright *v.* Wood, 1 Barnard, 111.

(*d*) Roe d. Chalmondley *v.* Doe, Barn. 455.

(*e*) Holmes d. Brown *v.* Brown, Doug. 437.

(*g*) Lord Coningsby's case, Stran. 548.

*After verdict the successful party is of course entitled to the judgment of the court;[1] and, unless when the statute 1 Geo. IV. c. 87, and 1 Wm. IV., c. 70, provide otherwise, the same time is allowed to the other party to move for a new trial, or an arrest of judgment, in ejectment, as in other actions.

The courts will seldom grant a new trial in ejectment, when the verdict is for the defendant; because, all parties remaining in the situation they wer pereviously to the commencement of the action, the claimant may bring a second ejectment without subjecting himself to additional difficulties; but this principle does not apply when the verdict is against the defendant.[2] The possession is then changed.

[1] If, in ejectment, the jury "find for the plaintiff one cent damages," the clerk, in the order, may extend the verdict, as if it were, "We of the jury find for the plaintiff the lands in the declaration mentioned, and one cent damages." M'Murry v. O'Neil, 1 Call's Rep. 246.

In Pennsylvania, a conditional verdict in ejectment is good. Coolbaugh et al. v. Pierce, 8 Serg. & R. Rep. 418.

After the plaintiff in ejectment has proved his title to a verdict, the court will not try the question of the precise extent of the plaintiff's claim as defended by particular metes and bounds. Doe ex dem. The Draper's Company v. Wilson, 2 Starkie's Rep. 477.

Plaintiff may take a verdict for certain described premises, and as to other described premises, enter a verdict for the defendant. (Per Spencer, Senator.) Seward v. Jackson ex dem. Van Wyck, 8 Cow. Rep. 406.

A verdict may be for a part of the premises claimed; and this rule applies as well to the quantity of interest as to the extent of the premises. Bear v. Snyder, 11 Wen. 592; Lenoir v. South, 10 Iredell, 237; Vrooman v. Weed, 2 Barb. Supr. Ct. Rep. 330; Truax v. Thorn, 2 Barb. Supr. Ct. Rep. 156; Hutchenson v. Horn, 1 Smith, 242.

A verdict for the whole of the premises claimed, when the plaintiff is entitled to only a part, will not be set aside, but will be amended according to the right of the case. Ib.

And if he claim an undivided share of a specified quautity of acres, he may recover such share in less quantity; but, it seems, if he claim an undivided half of certaim premises, he cannot recover an undivided third, or an undivided fourth, or the whole of the premises; nor, if he claim the whole, can he recover an undivided half, an undivided fourth, or an undivided third of the premises. Holmes v. Seeley, 17 Wen. 75. But see Jackson v. Goodtitle, 7 Blackf. Rep.; Vrooman v. Weed, 2 Barb. Rep. 330; Truax v. Thorn, Ib. 156.

On the trial of an ejectment, the court cannot take notice of equitable circumstances, which do not constitute a complete title. Den ex dem. Cunningham v. Michael, Cam. & Norw. Rep. 77.

In ejectment, an objection cannot be made at the bar that the plaintiff failed at the trial to make out a title, unless such objection was previously made at the trial. Jackson ex dem. Scofield v. Collins, 2 Cow. Rep. 89.

[2] Where a verdict in favor of a defendant in ejectment, is founded in mistake and produces injustice, it is both the right and duty of the court to grant a new trial. Deems v. Quarrier, &c., 3 Rand. Rep. 475.

The court inclined to think, that paupers, supported by the township, might unite with the overseers of the poor in an ejectment; but, at any rate, refused to grant a new trial on that ground. Ripple et al. v. Ripple et al., 1 Rawle's Rep. 386.

The defendant in the first ejectment becomes *the plaintiff's [*327] lessor in the second, and is obliged to give evidence of his own title, instead of merely rebutting the claim set up by his opponent; and as this is a point of material consequence to him, "the courts (to use Lord Mansfield's words,) rather lean to new trials on behalf of defendants in the case of ejectments, especially on the footing of surprise."(a)

OF THE JUDGMENT.[1]

By the judgment in ejectment, the plaintiff's lessor obtains possession of the lands recovered by the verdict, but does not acquire any

(a) Clymer *v.* Littler, 1 Blk. 345, 348.

If the verdict of a jury is insufficient or contrary to the admission of the parties, the court have the power of granting a new trial or ordering a *venire*. Hughes' Lessee v. Howard, 3 Harr. & Johns. Rep. 8; Riggs v. Savage, 2 Gilman, 400; Williams v. Brunton, 3 Gilman, 600.

[1] The Revised Statutes of New York (part 3, chap. 5, tit. 1, secs. 26, 28, 29, 30, 31, 32, 33, 34, 35, 36,) contain the following provisions:

"Sec. 26. In cases where no other provision is made, the judgment in the action, if the plaintiff prevail, shall be, that the plaintiff recover possession of the premises, according to the verdict of the jury, if there was such verdict; or if the judgment be by default, according to the description thereof in the declaration, with costs to be taxed.

"Sec. 28. Upon a judgment against the plaintiff, or one or more plaintiffs, in cases where they shall be liable for costs, execution for the collection of the same shall be issued, as upon judgments in personal actions; and the proceeding by attachment for the collection of such costs is hereby abolished.

"Sec. 29. Every judgment in the action of ejectment, rendered upon a verdict, shall be conclusive as to the title established in such action, upon the party against whom the same is rendered, and all persons claiming from, through, or under such party, by title accruing after the commencement of such action, subject to the exceptions hereinafter contained.

"Sec. 30. The court in which such judgment shall be rendered, at any time within three years thereafter, upon the application of the party against whom the same was rendered, his heirs or assigns, and upon payment of all costs and damages recovered thereby, shall vacate such judgment and grant a new trial in such cause. And the court, upon subsequent application, made within two years after the rendering of the second judgment in said cause, if satisfied that justice will be thereby promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment, and grant another new trial. But no more than two new trials shall be granted under this action.

"Sec. 31. Every judgment in ejectment rendered by default, shall, from and after three years from the time of docketing the same, be conclusive upon the defendant, and upon all persons claiming from or through him by title accruing after the commencement of the action. But within five years after the docketing of such judgment, on the application of the defendant, his heirs or assigns, and upon payment of all costs and damages recovered thereby, the court may vacate such judgment and grant a new trial, if such court shall be satisfied that justice will be promoted, and the rights of the parties more satisfactorily ascertained and established.

title thereto, except such as he previously had.[1] If, therefore, he has a freehold interest in them, he is in as a freeholder; if he has a chattel

"Sec. 32. But if the defendant in such action, at the time of the docketing of the judgment by default, be either,

"1. Within the age of twenty-one years: or,

"2. Insane: or,

"3. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any term less than for life: or,

"4. A married woman:

"The time during which such disability shall continue, shall not be deemed any portion of the said three years; but any such person may bring an action for the recovery of such premises after that time, and within three years after such disability shall be removed, but not after that period.

"Sec. 33. If the person entitled to commence such action shall die during the continuance of any disability specified in the preceding section, and no determination or judgment be had of or upon the title, right, or action so to him accrued, his heirs may commence such action, after the time above limited for that purpose, and within three years after his death.

"Sec. 34. If the plaintiff shall have taken possession of the premises, by virtue of any recovery in ejectment, such possession shall not in any way be affected by the vacating of any judgment, as herein provided; and if the defendant recover in any new trial hereby authorized, he shall be entitled to a writ of possession, in the same manner as if he was plaintiff.

"Sec. 35. Upon any new trial, granted as herein provided, the defendant may show any matters in bar of a recovery which he might show to entitle him to the possession of the premises, if he were plaintiff in the action.

"Sec. 36. The plaintiff, recovering judgment in ejectment in any of the cases in which such action may be maintained, shall also be entitled to recover damages against the defendant for the rents and profits of the premises recovered. But if such action be brought for the recovery of dower, the plaintiff shall be entitled to recover such damages only in the cases and to the extent prescribed in the first chapter of the second part of the Revised Statutes."

[1] "In ejectment at least, if not in every possible case, the decision of this court [supreme court, U. S.,] must conform to the state of rights of the parties at the time of its own judgment; so that a treaty, although ratified subsequent to the decision of the court appealed from, becomes a part of the law of the case, and must control our decision." Fairfax's Devise v. Hunter's Lessee, 7 Cranch's Rep. 603, 632. (Per JOHNSON, J.)

The whole effect of a judgment for the plaintiff in ejectment, is to put the lessor of the plaintiff into possession of the land; and the only point decided is, that he has a better title to the possession than the defendant. Chapman v. Armistead, 4 Munf. Rep. 382; Parks v. Moore, 13 Verm. 183; Hawkins v. Hayes, 3 Harrington, 489.

On ejectment there is a verdict and judgment for plaintiff; defendant in first action brings ejectment in which there is a verdict and judgment for him, but which was reversed; in another ejectment by the plaintiff in the second, held, that the verdict and judgment in the first, and reversal in the second were not a bar to a third. Mercer v. Watson, 1 Watt's Rep. 330.

In ejectment a judgment of another court on which defendant's title is founded may be impeached on the ground of fraud. Hall v. Hamlin, 2 ib. 354.

The record of a former judgment in which the value of the defendant's improvements is

interest, he is in as a termor; and if he has no title at all, he is in as a trespasser,[1] and liable to account for the profits to the legal owner, without any re-entry on his part.(*a*)[2] Since, then, the claimant has a mere *possession* given to him by the judgment, it may be asked how he can become *seised* according to his title, if he have more than a chattel interest in the land. This is effected by another fiction. It is a rule of law, that when a man having a title to an estate comes into possession of it by lawful means, he shall be in possession according to his title; and, therefore, when *possession* is once *given by [*328] the sheriff, the possession and title are said to unite, and the plaintiff's lessor holds the lands according to the nature of his interest in them.

As the judgment is grounded on the verdict, it ought not to be entered up for more land, or for different parcels, than the defendant was found guilty of,[3] though a variance between the verdict and judg-

(*a*) Taylor d. Atkins *v.* Horde, Burr. 60, 90, 114.

adjudged to him, and which remains unpaid is no bar to another action of ejectment for the same land between the same parties. Maxwell v. King, 3 Yerger's Rep. 460.

Motion in arrest of judgment because the declaration against the casual ejector was wrongly entitled, and for other defects in it, refused, because the declaration *de novo* to which the defendant had pleaded was right. Lessee of Huydekoper v. Burrowes, 1 Wash. Circ. Ct. Rep. 109. (Cited in Coxe's Digest, p. 271.)

[1] "The amount of a recovery in ejectment is accurately and forcibly stated, by Lord Mansfield, in the case of Atkyns v. Horde, (1 Burr. 114.) It is a recovery of the possession (not of the seisin or freehold,) without prejudice to the right, as it may afterwards appear, even between the same parties. He who enters under it, in truth and substance, can only be possessed according to right. If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a termor. If he has no title, he is in as a trespasser. If he had no right to the possession, then he takes only a naked possession. This is the obvious and established construction of the nature and effect of a judgment in the action of ejectment." (Per Van Ness, J., delivering the opinion of the court.) Jackson ex dem. Wright et al. v. Dieffendorff et al., 3 Johns. Rep. 270.

[2] A former judgment for the defendant in an action of ejectment or disseisin, on the issue of no wrong and disseisin, is not an estoppel of the plaintiff's title; as such judgment may have been rendered, on the ground that the defendant had not been in possession, or had possessed by license from the plaintiff, or on some other ground not involving the question of title. Smith v. Sherwood, 4 Conn. Rep. 276.

A judgment in ejectment rendered on confession, is not evidence against the plaintiff in another ejectment more than a judgment on a verdict would be. Betts, &c. v. Shield's Heirs, 3 Litt. Rep. 36.

[3] The jury need not find the exact quantity of land in possession of the defendant in ejectment. Little v. Bishop, 9 B. Monroe, 240. But if they omit, in their verdict, an important item of property upon which issue was joined and submitted to them, it is a substantial defect. Wise v. Hine, 1 Greene's Iowa Rep. 62.

ment, occasioned by the misprision, or default, of the clerk in entering the judgment, may be amended by the court, even after a writ of error brought.(*a*)

(*a*) Mason *v.* Fox, Cro. Jac. 631; Appendix, No. 34.

A verdict in ejectment, that the defendant should have the "third part of the forty-one acres and thirty-two perches neat, and if any overplus, it goes to the plaintiff," is too uncertain: and it cannot be cured by the court's appointing a surveyor to designate the rights of the parties and rendering judgment thereon. Smith v. Jenks et al., 10 Serg. & R. Rep. 153.

In ejectment, the verdict for the plaintiff, for the lands laid down in a survey made in the cause, as comprehended within certain lines described by the jury; a judgment that the plaintiff recover his term yet to come, of and in the lands in the declaration mentioned, is erroneous. Lee v. Tapscott, 3 Wash. Rep. 276.

A judgment in ejectment must be for the premises in the declaration mentioned. It is error to take a judgment for the land in the plot described. Woolry v. Clay, 3 Marsh. Rep. (Ky.) 136.

In ejectment against several defendants, who possessed the premises in separate parts, and who entered into the consent rule, and pleaded jointly, the jury found each defendant separately guilty, as to that part of the premises in his separate possession, and not guilty as to the other parts possessed by the defendants: the verdict is good, and the plaintiff is entitled to judgment against all the defendants, severally, according to the finding of the jury. Jackson ex dem. Haines et al. v. Woods et al., 5 Johns. Rep. 278.

Where several defendants appear and plead jointly, and enter into the consent rule jointly, the plaintiff is bound to prove a joint possession of all the defendants; and if on the trial, it appear that two of the defendants occupied distinct parcels of the premises in severalty, and that the other defendants possessed the residue of the premises jointly, the plaintiff can have judgment only against the defendants holding jointly, and the defendants holding in severalty will be entitled to judgment. Jackson ex dem. Murray et al. v. Hazen et al., 2 Johns. Rep. 438. Dear v. Snowhill, 1 Green's Rep. 23.

The plaintiff in ejectment may recover less land than the quantity stated in his declaration. But, if the jury find a special verdict, showing the plaintiff entitled to a certain number of acres, part of the tract sued for, and do not specify the boundaries of such part with so much precision, as that possession thereof may with certainty be delivered, a *venire de novo* ought to be awarded. Clay v. White et al., 1 Munf. Rep. 162.

Issue being joined in ejectment on the title only, a verdict may be found and judgment rendered for a tract of land "according to the survey filed in the cause;" though described in the declaration as a "messuage with the appurtenances; in a subsequent part thereof, as the said tenement with appurtenances:" and in the conclusion, as "the plaintiff's said farm;" without mentioning quantity or boundaries. Paul v. Smiley, 4 Munf. Rep. 468.

A verdict in ejectment, set aside as being uncertain, and contradictory, and not to be reconciled without a strained construction. Doe, Lessee of Murra v. Northem, 1 Wash. Rep. 282.

A verdict in ejectment finding for the plaintiff in general terms, a certain "number of acres, part of the premises in the declaration mentioned," without designating the boundaries of such part, or referring to some certain standard, to supply such defect, is too uncertain to warrant a judgment upon it. Gregory v. Jackson, 6 Munf. Rep. 25.

A special verdict in ejectment set aside, for not finding the time of the death of a person,

The courts, indeed, after judgment, make every possible intendment in favor of the claimant;[1] and if the title declared on can by any

under whom the lessors of the plaintiff might or might not have been entitled to the land in controversy; their title depending upon the time when he died, which, from the circumstances disclosed in the verdict, probably could have been found by the jury; also, for not finding whether the defendant, or those under whom he claimed, had, or had not such possession of the land as would be sufficient for his defence, in that action, whatever might be the state of the title. Cropper v. Carlton et ux., 6 Munf. Rep. 277.

In ejectment on separate demises for undivided parts of the land, before the trial, all the lessors, except one, had parted with their legal interest in the land, and the nature of his interest had been converted from an undivided portion in the whole, to a several and entire interest in part. Held, that although the plaintiff can recover less than he claims, yet it must consist of the same nature with that claimed. If he claim one hundred acres, less than one hundred may be recovered. If he claim an undivided moiety, an undivided third may be recovered, or any undivided portion less than a moiety: but he cannot recover an undivided part when he claims an entirety, nor an entirety when he demands an undivided portion. Carroll et al. Lessee v. Norwood's Heirs, 5 Harr. & Johns. Rep. 164.

A judgment in ejectment, for the plaintiff, on a single demise contained in a single count, that he recover his term in two parcels of land, being erroneous as to one parcel, is so *in toto*. (Per SPENCER, Senator.) Seward v. Jackson ex dem. Van Wyck, [in error,] 8 Cow. Rep. 406.

For a court of error cannot divide a judgment, which is entire, reversing it in part and affirming it in part. Ib.

Otherwise, perhaps, where the declaration in ejectment contains more than one count. Ibid.

Where ejectment was brought by one tenant in common against his co-tenant for an undivided moiety, and the consent rule for the undivided moiety was entered in the common form, and the plaintiff proved title to an undivided moiety only; held, that the defendant was entitled to judgment as to the one moiety only, though, as to the other, the plaintiff was entitled to judgment by default. Jackson ex dem. Jones et al. v. Lyons, 18 Johns. Rep. 398.

Where the title of the lessor, being a life estate, ends before the trial, the plaintiff is entitled to judgment, but with a perpetual stay of the writ of possession, as to enable him to bring an action for the mesne profits. Jackson ex dem. Henderson v. Davenport, 18 Johns. Rep. 295. See Gordon v. Overton, 8 Yerger's Rep. 121.

In an action of ejectment for 50 acres of arable land, 10 acres of meadow, and 100 acres of wood land, part of a tract of land called H. F.: the jury, by their verdict, found the true location of that tract, and also the locations of other tracts of land for which the defendant took defence. They also found for the plaintiff all the land called H. F., as located by them, which lies clear of the other tracts so located by them, and which lies to the eastward of a division line between the plaintiff's lessor and J. S., from a particular point to another. Held, that the verdict, and the judgment thereon rendered, were not uncertain, and were not for more land than the plaintiff claimed in his action. Hall v. Gitting's lessee, 2 Har. & Johns. Rep 380, 393.

[1] In ejectment, the jury have a right to find a general verdict for the plaintiff, if the defendant produce a patent of older date for a part of the land, without designating what part. Buckley v. Cunningham, 4 Bibb's Rep. 285.

The omission of the name of the township, in the writ of ejectment, will be fatal on a plea in abatement. Lyons v. Miller et al., 4 Serg. & R. Rep. 280.

means be supposed to exist, consistently with the judgment, such judgment will be supported. Thus, where two demises were laid, by different lessors, of the same premises for the same term, both as to commencement and duration, and the judgment was that the plaintiff recover his *terms* in the premises; and it was objected, that both lessors could not have a title to demise the whole; and that, therefore, there was an inconsistency in the judgment, and that it did not appear which of the lessor's rights was established, the court affirmed the judgment;[1] because, after a verdict, a bare possibility of title consistent with the judgment is sufficient, and the two lessors might have been joint tenants, and yet refuse to join in a lease (*a*) In like man-
[*329] ner *where the declaration contained two distinct demises, by

(*a*) Morres *v.* Barry, Stran. 1186; ante, 209.

But, if the objection be not pleaded in abatement, it cannot be afterwards made. Ib.

A variance in the description of land, between the writ and the statement filed in ejectment brought under the act of 21st March, 1806, [Pennsylvania,] is cured by verdict. Thomas v. Culp, 4 Serg. & R. Rep. 271.

[1] Where two demises are laid in the declaration, one valid and the other void, and the judgment is, that the plaintiff recover his term, in the singular, it shall be adjudged to have been rendered on the valid demise. Cox v. Lacy, 3 Litt. Rep. 334.

The defendant in ejectment, who had himself conveyed the land to the plaintiff, is estopped to deny that he had title when he conveyed. Ib.

If several demises are laid in the declaration, from several lessors, and the court give judgment for the plaintiff to recover "his term yet to come," the judgment will be sustained, and the plaintiff can only have one execution. Camden et al. v. Haskill, 3 Rand. Rep. 462.

After issue joined in ejectment, on the title only, and a verdict for the plaintiff, for the land in one of the counts in the declaration mentioned; it is no ground for arrest of judgment, that the two counts laid demises of the same land from different persons. Throckmorton v. Cooper's lessee, 3 Munf. Rep. 93. *Quære.* Would a demurrer to the declaration in this case have been sustained?

A plaintiff in ejectment may recover under one or the other of two demises of the same land, from different persons. Hopkins et al. v. Ward et al., 6 Munf. 38.

The statute (59 Geo. III., ch. 12, sec. 17,) empowers church-wardens and overseers to take lands and hereditaments in the nature of a body corporate, and declares that, in all actions brought in respect thereof, it shall be sufficient to name the church-wardens and overseers, for the time being, describing them as the church-wardens and overseers of the poor of the parish for which they shall act, and naming such parish. Where a declaration in ejectment by church-wardens and overseers, contained two sets of counts, one describing them by their office without their names, and the other by their names without their office; held, after verdict, the objection, if any, was cured. Doe ex dem. The Church-wardens and Overseers of the Parish of Orleton v. Harpur, 2 Dowl. & R. Rep. 708.

Where there is a joint and several demise, and no joint right is proved, no recovery can be had upon the joint demise, but upon the separate demise, so far as title is shown in the lessors. Riggs v. Dooley, 7 B. Mon. Rep. 236.

two different lessors, of two distinct undivided thirds, and judgment was given that the *plaintiff "*do recover his said terms*," and on error it appeared (from the facts stated in a bill of exceptions to the judge's directions on a point of law) that the ejectment respected only one undivided third, the judgment was held well enough, when the point was only raised on a bill of exceptions, and *semble* that it would have been well even on a special verdict.(*a*) Upon the same principle, when in an ejectment on two several demises of two separate parcels of lands, the judgment was entered, that the plaintiff do recover his *term*, and an objection was taken, that it should have said, that the plaintiff do recover his *terms*, the court said they would extend the word *term* to his *term* in A., and his *term* in B., and affirmed the judgment.(*b*) And where the ejectment was upon two demises, by different lessors, and the second demise was "of *the aforesaid* premises," and the judgment was entered for the plaintiff as to the first demise, and the defendant as to the other; and it was objected, that from not stating the second demise to be of "*other premises*," the judgments were contradictory to each other, inasmnch as the defendant was put without day, as to the same premises for which the plaintiff recovered, the court affirmed the judgment, and construed *the aforesaid premises which the second lessor demised* to mean the term in the premises.(*c*) So, also, where the plaintiff in ejectment declared upon two demises *of several lands, by several parties, but laid only one *habendum*, namely *habendum tenementa prædicta*, so demised by the [*330] aforesaid several parties, for seven years, and it was assigned for error, that the declaration was ill for want of another *habendum;* for that the verdict was general, and it was uncertain to which demise the single *habendum* related, the court held that *reddendo singula singulis*, it was well enough.(*d*) Where also the declaration was for lands, and common of pasture generally, without stating the common to be appendant, or appurtenant, it was intended after verdict, on a writ of error, to be such common as ejectment could be maintained for.(*e*) And where the ejectment was for one messuage, or tenement, and four acres of land to the same belonging, the words "to the same belonging" were held

(*a*) Rowe d. Boyce *v.* Power, 2 N. R. 135.

(*b*) Worrall *v.* Brent, Stran, 835.

(*c*) Fisher *v.* Hughes, Stran. 908.

(*d*) Sleabourne *v.* Bengo, 1 Ld. Raym. 561; Moore *v.* Fursden, 2 Vent. 214; S. C., Carth. 224; S. C., Comb. 190.

(*e*) Newman *v.* Holdmyfast, Stran. 54; ante, 17.

to be void; for land cannot properly belong to a house, and then it is a declaration of a messuage or tenement, and four acres of land, which, though it be void for the tenement, is good for the *land;* for which the plaintiff, upon releasing the damages, had judgment.(*a*)

[*331] Upon a similar principle, where the plaintiff, in the **first* year of the reign of Geo. III., declared upon a demise of the *thirty-third* year of that reign, the court held that it was well enough after verdict, because it was only a title defectively set out, and there could be do doubt but that a proper title was proved at the trial.(*b*)

If the plaintiff obtain a verdict for the whole premises demanded, the entry of the judgment is, that the plaintiff recover his term against the defendant of and in the premises aforesaid, or that he recover possession of the term aforesaid.[1] And this form is also used, where a moiety, or other part, of the whole premises is recovered; as, for example, when the plaintiff declares for forty acres in A., and recovers only *twenty; and it is at the lessor's peril, that he take out execution for no more than he has proved title to.(*c*) But where the verdict is for some parcels and not for all, or part of all, as where the plaintiff declares for land in A., and lands in B., and the defendant is found guilty in A. only, the judgment(*d*) is, that the plaintiff recover his term in A.; and as to the other part, whereof the jury acquitted the defendant, that

(*a*) Wood *v.* Payne, Cro. Eliz. 186. In an old case, where the plaintiff declared on a lease of a house, ten acres of land, twenty acres of meadow, and twenty acres of pasture, by the name of "a house and ten acres of meadow, be the same more or less," and had a verdict, the judgment was arrested; because the declaration was so uncertain and repugnant, that even the verdict could not help it, the land mentioned in the declaration being so different from that mentioned in the pernomen. (*Anon.*, Yelv. 156.) But *quære* if such a verdict would not now be good for the ten acres?

(*b*) Small d. Baker *v.* Cole, Burr. 1159.

(*c*) Doe d. Drapers' Company *v.* Wilson, 2 Star. 477.

(*d*) As an ejectment is an action of trespass *vi et armis*, the judgment before the statute of 5 & 6 W. & M. c. 12, used to run *quod defendens capiatur;* but, since that statute, such entry is no longer necessary. (Linsey *v.* Clerk, Carth. 290; S. C., 5 Mod. 285.)

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[1] The usual judgment in ejectment is for the premises in the declaration mentioned, and a judgment for all the lands that the tenant had not inclosed on a certain day, is good. Simpson's heirs v. Shannon's heirs, 5 Litt. Rep. 322.

See Farrow v. Farrow, 2 J. J. Marsh. Rep. 388.

The judgment, until set aside, or made void by an adverse recovery in a subsequent suit, is of the same obligation as any other judgment. Hinton v. M'Neil, 5 Ham. 509.

the plaintiff be in mercy, and that the defendant go thereof without day.(*a*)

If the defendant be acquitted of part, and judgment *be entered *quod defendens sit quietus quoad* that part whereof he is acquitted, this is error; for the judgment in this action is not final, as in a writ of right; nor does it protect the defendant from any further suit, but only acquits him against the title set up by the plaintiff in the action.(*b*) [*332]

If a sole defendant die after the commencement of the assizes and before verdict, or after verdict and before judgment, it will not abate the suit;[1] nor can his death be alleged for error, provided the judgment be entered within two terms after the verdict.(*c*)

When there are several defendants, and one of them dies at any time before judgment, the lessor may proceed against the survivors, upon suggesting the death(*d*) of such defendant upon the plea roll; the suggestion need not also be entered upon the *nisi prius* roll; for it is sufficient if it there appear to the judge, what he is to try, and between whom; nor need the *judgment say, *quod quærens nil capiat per preve* against the dead defendant.(*e*)

If one of several defendants die before verdict, it is the better way to suggest his death on the roll before the trial, and to award a *venire* to try the issue against the surviving defendants;(*e*) although where in such case the *venire* was awarded against all, upon suggesting *the death of one upon the roll after the verdict, the plaintiff had judgment for the whole against the others.(*g*) But if the lessor proceed to trial, and obtain judgment against all the defendants, [*333]

(*a*) Judgment Book, 72, 73.
(*b*) Taylor *v.* Wilbore, Cro. Eliz. 768.
(*c*) 17 Car. II. c. 8.
(*d*) 8 & 9 Wm. III. c. 11, s. 7.
(*e*) Far *v.* Denn, Burr. 362.
(*g*) Gree *v.* Rolle, Ld. Raym. 716.

[1] Under the 3rd section of the act of the 13th of April, 1807, [Pennsylvania,] in case of the death of a party in ejectment, the person next in interest may be compelled to appear. Darnes v. Welsh, 7 Serg. & R. Rep. 203.

without such suggestion, it is error, because there can be no verdict, or judgment, against a person not in being.(*a*)

The entry of the judgment, notwithstanding the death of one of several defendants, ought to be general, that the plaintiff recover his term in the premises against the survivors;(*b*) but execution must not be taken out for more than the plaintiff has a right to recover.

It seems that if the defendants make a joint defence for the whole land demanded, and one of them die, execution may be given of the whole, because the whole interest comes by survivorship to the others, and therefore the plaintiff hath still persons before the court to defend the whole; but that where each of the defendants makes a defence for part only, the plaintiff, upon the death of one of them, must not take out execution for the part in his possession, because they are in the nature of distinct defendants, and consequently, as to that part which was defended by the person deceased, there is no person in court against whom judgment can be given, or execution taken out.(*a*)

[*334] *If an ejectment be brought against baron and *feme*, *and the plaintiff have a verdict against *both*, but, before judgment, the husband dies, the plaintiff, on suggesting his death, may have judgment against the wife; because (having been found guilty of the trespass) she must have obtained the unlawful possession *jointly* with her husband, or have had the whole possession in her own right; and in either case, the possession is wholly in her on the death of her husband.(*c*)

An opinion has generally prevailed, that a judgment in ejectment is not in any case admissible in evidence in a subsequent ejectment, but it now appears to be settled that where the parties, the premises, and the demise, are the same in both actions, the judgment in the first action is evidence in the second, as against the party against whom it was recovered.(*d*) The value of such evidence must, however, be slight; and it seems the courts will not extend the principle. Thus, in

(*a*) Gilb. Eject. 98.
(*b*) Far *v.* Denn, 1 Burr. 362.
(*c*) Rigley *v.* Lee, Cro. Jac. 356; Lee *v.* Rowkeley, 1 Roll. 14.
(*d*) Doe d. Strode *v.* Seaton, 2 C., M. & R. 731; B. N. P. 232; 4 Bac. Ab. Ev. F.; *et vide*, Wright *v.* Doe d. Tatham, 1 Ad. & Ell. 19.

an ejectment against A. on the demise of B., a mortgagee, a recovery in a former ejectment subsequently to the mortgage, on the demise of A. against C. (the mortgagor,) was held inadmissible for A.;(*a*) and where A. and B. were in possession of the same premises, and A. let judgment go by default, and B. appeared, the judgment against A. was held not to be admissible on the trial against B.(*b*)

OF THE COSTS.[1]

The general rule that persons who are not parties to the record cannot be made liable to the costs of the suit, is held not to be applicable

(*a*) Doe d. Smith *v.* Webber, 3 Nev. & M. 746.
(*b*) Doe d. Morse *v.* Williams, 1 Car. & M. 615.

[1] The costs of an ejectment, brought by a widow for dower, under the Revised Statutes of New York, may be avoided by the tenant's assigning dower during the quarantine of the widow. Yates v. Paddock, 10 Wen. 528.

But if such assignment be not made, and the action be brought, although before admeasurement of dower, the plaintiff will recover costs, notwithstanding that before suit the tenant made an offer to the widow to take her dower. Ib.

See act regulating costs in proceedings to recover damages for the use and occupation of lands after judgment in ejectment, passed May 9th, 1837.

If there is a verdict for the defendant, judgment for costs must be entered against the nominal plaintiff, and not against the lessor. Doe v. Owen, 2 Blackf. 452.

An action of ejectment was referred to arbitration, and the reference which was confined to that action stated, that if the arbitrator should award that the plaintiff had any cause of action, he should have costs, as in court of law. The arbitrator, by his award, directed the defendant to deliver up the premises, and pay the costs of the action, and a sum of money to the plaintiff for the loss of rent during the time the defendant held possession. He also directed the parties to execute general mutual releases. On a motion for an attachment against the defendant for the sum awarded to the plaintiff, held, that the award was, in that respect, good, although the arbitrator did not find in terms that the plaintiff had any cause of action; and, also, that if the award were bad as to the direction of mutual release, that would not vitiate the whole award. Doe ex dem. Williams v. Richardson, 8 Taunt. Rep. 697.

Where a person is made a lessor against his consent, and the nominal plaintiff afterwards becomes non-suit, such lessor is not liable for costs; but the plaintiff's attorney, who used the name of such person as lessor, without his authority, is liable. The People v. Bradt, 6 Johns. Rep. 318.

If the name of a person be used as lessor, without his consent, it may be struck out, on application to the court. Jackson ex dem. Goodrich et al. v. Ogden et al., 4 Johns. Rep. 140.

Where a lessor was brought up on an attachment for the non-payment of costs, and he denied that he ever consented to have his name used in the action: the court said, that they could not receive his denial in bar of the attachment, nor decide between the contradictory affidavits of the party and the attorney; but the party must pay the costs, and take

to actions of ejectment, over which, as has already been observed, the courts, from the fictions with which it abounds, exercise a stringent but

his remedy over against the attorney who inserted his name as lessor; but they stayed the proceedings, to give the party an opportunity to bring his action against the attorney, and to try the truth of the allegation. The People v. Bradt, 7 Johns. Rep. 539.

It is too late, after trial, to move that the lessors of the plaintiff, who were infants, file security for costs, *nunc pro tunc*. Jackson ex dem. Ewing et al. v. Bushnell, 13 Johns. Rep. 330.

The defendant moves for a new trial in an action of ejectment, which the plaintiff does not oppose; the latter is entitled to no costs. Ford v. Walsworth, 22 Wen. 657.

In an action of ejectment, where the defendant is a convict in the state prison, the plaintiff, on a motion for a judgment, as in case of non-suit, instead of being required to stipulate to bring the cause to trial, will have leave to discontinue without costs, unless security be given, for the mesne profits and costs that may be recovered against the defendant. Fort v. Palmerton, 19 Wen. 94.

The costs of such action of ejectment may be avoided by the tenant assigning dower during the quarantine of the widow; but if such assignment be not made, and the action be brought, although before admeasurement of dower, the plaintiff will recover costs, notwithstanding that before suit, the tenant made an offer to the widow to take her dower. Yates v. Paddock, 10 Wen. 528.

Where a defendant in ejectment moves for a new trial under the statute, the court cannot require, as a condition, that he shall pay the costs of a suggestion for mesne profits; nor can they impose any terms beyond payment of costs of the principal suit. Shaw v. McMaren, 2 Hill, 417.

In ejectment, the execution for costs against the defendant properly issues in the name of a nominal plaintiff alone. Brown v. Demont, 9 Cow. 263.

On an application for an attachment for costs, on non-suit, for not confessing lease, entry, and ouster, the affidavit must show that there was authority from the lessor to demand the costs of the tenant. Jackson ex dem. Cramer v. Stiles, 3 Cai. R. 140.

It is too late, after trial, to move that the lessors of the plaintiff, who were infants, file security for costs, *nunc pro tunc*. Jackson ex dem. Erving v. Bushnell, 13 J. R. 330.

The rule is, that where the same title to the same premises is drawn in question in the second suit, between parties or privies to the first, the court will order a payment of the costs of the first suit before they will suffer the second to proceed. Jackson ex dem. Livingston v. Edwards, 1 Cow. 138.

Edwards, the defendant, in 1820, brought ejectment against one Brown, who was tenant to all lessors in this action except Cornelia Livingston, laying it on his own demise, for the same lot; and recovered judgment, with costs which remain unpaid, and had a writ of possession executed by virtue of which he was in possession. The same lessors afterward sued this action; and being in relation to the same title, and the same premises which were recovered in the former action, the change, by introducing the name of Cornelia L., cannot render it an exception to the above general rule. Ib.

Where the lessors in the former suit of ejectment are neither of them named in the second suit, nor any one claiming under them, the court will not stay proceedings in the second suit until the costs of the first be paid; although the lessor of the plaintiff in the second suit claims under the same title; especially where he goes for a distinct portion of the premises, and for aught that appeared, was an utter stranger to the former suit. Jackson v. Clark, 1 Cow. 140.

most useful control; *and they will order the party really interested to pay costs, although he is neither the defendant on the record nor has entered into the consent rule, nor is in any manner before the court, provided he has interfered in the suit, and carried on the defence.(a) The ground of this distinction is, that in ejectment the action must be brought against the tenant in possession, and the courts will therefore not permit the party really interested to put a pauper into possession to evade the costs.(a) It is probable also (especially with reference to the late rule of court,(b) enabling defendants to appear and plead, although the claimant shall not have moved for judgment against the casual ejector) that the courts will now apply this principle to the claimant as well as the defendant, and, on the ground that they can make the real party to the suit pay the costs,(c) although a different practice formerly prevailed,(d) direct the claimant to pay the defendant's costs, if he shall abandon the action after appearance, and refuse to join in the consent rule.(e) But this rule will not be extended to parties

(a) Thrustout d. Jones *v.* Shenton, 10 B. & C. 110; Doe d. Masters *v.* Gray, 10 B. & C. 615; Beckerley *v.* Dimery, 10 B. & C. 113.

(b) Hil. Term, 4 Vict.

(c) Doe d. Masters *v.* Grey, 10 B. & C. 615.

(d) Goodright d. Ward *v.* Badtitle, Blk. 763; Smith d. Ginger *v.* Barnardiston, Blk. 904.

(e) Doe d. Williams *v.* Smith, 9 Dow. P. C. 1011.

A female, who is lessor to the plaintiff in ejectment, is liable to an attachment for not paying the defendant's costs, where they do not exceed fifty dollars, although the statute exempts females from imprisonment on execution in any civil action where the debt or damages shall not, exclusive of costs, exceed $50. Jackson v. Haines, 2 Cow. 462.

To warrant an attachment for non-payment of costs against the lessor in ejectment, on judgment for the defendant upon verdict, a *ca. sa.* against the nominal plaintiff is first required, though the principle on which the rule rested was not perceived. The People v. Merritt, 7 Cow. 415.

The demand for costs, under the rule *nisi*, may properly be made of any one of the lessors of the plaintiff. Jackson v. Thompson, 7 Cow. 426.

And, it seems, a demand, either of the party or the attorney, will be insufficient, in order to a judgment upon the rule *nisi*. Gilliland v. Morrell, 1 Cai. R. 154, 155.

On motion for an attachment, for not paying costs, on account of the plaintiff's being nonsuit, for not confessing lease, entry, and ouster; held, that the affidavit must state that the person demanding them of the tenant was authorized by the lessor of the plaintiff. Jackson v. Stiles, 3 Cai. R. 140.

If a person be admitted to defend, on payment of costs, and, having entered into the consent rule, keep out of the way to avoid the service of the *ca. sa.* copy against the casual ejector, he will be cited to show cause why an attachment should not go against him; and the latter rule may be served at the defendant's house. Jackson v. Stiles, 2 Cai. R. 368. N. Y. Dig., vol. 2, p. 870.

who may assist the defendant, or carry on the defence for him, at their own cost, if they have no interest in the premises ;(*a*) nor can the party in possession recover, as costs against the claimant, the costs of any rules for setting aside proceedings for irregularities, unless he has appeared to the action, or signed the consent rule.(*b*)

It would seem also from the general current of authorities, that no person who does not enter into the consent rule can be liable to the claimant for his costs ; but it was ruled otherwise *by Lord Tenterden, who directed that an order should be made upon parish officers for the payment of costs, in a case in which the action had been defended by an order of vestry, although they were no parties upon the record, saying, "in ejectment we can make the real party to the suit pay the costs."(*c*)

When the action is undefended, and the judgment against the casual ejector, the only remedy of the claimant for his costs, is an action for mesne profits, in which, at the discretion of the jury, they are recoverable as consequential damages.

When the party interested appears and enters into the consent rule, and afterwards at the trial refuses to confess, he is liable, upon that rule, to the payment of costs, and may be proceeded against by attachment for the recovery of them ;(*d*)[1] but no writ of *fieri facias*, or

(*a*) Doe d. Wright *v.* Smith, 8 Dow. P. C. 517.

(*b*) Doe d. Vernon *v.* Roe, 7 Ad. & Ell. 14; Goodtitle d. Murrell *v.* Badtitle, 9 Dow. P. C. 1009.

(*c*) Smith d. Ginger *v.* Barnardiston, Blk. 904.

(*d*) Turner *v.* Barnaby, 1 Salk. 259.

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[1] On an application for an attachment for costs, on non-suit, for not confessing lease, entry, and ouster, the affidavit must show that there was authority from the lessor to demand the costs of the tenant. Jackson ex dem. Cramer v. Stiles, 3 Caines' Rep. 140.

Ejectment and judgment for cost against the plaintiff: presenting the lessor of the plaintiff with the *ca. sa.*, and serving him with the consent rule, and demanding the costs, are not enough to warrant an attachment, but the taxed bill should be served by showing him the original and delivering a copy. The People v. Housenfratts, 3 Cow. Rep. 26.

A female lessor of the plaintiff, in an action of ejectment, is not exempt from an attachment for non-payment of the defendant's costs, where they do not exceed fifty dollars. Jackson ex dem. Vrooman et al. v. Haines, 2 Cow. Rep. 462.

The statute exempting females from imprisonment, on execution, does not apply to such a case Ib.

capias ad satisfaciendum, will lie, because the judgment is against the casual ejector.(*a*)

When there are several defendants, some of whom appear and confess, but others do not *appear, and a verdict is found [*335] against those who do appear, each defendant is liable for the whole costs, and the plaintiff's lessor may tax them all against any one or all of the defendants at the same time; that is to say, upon the *postea* against those who appear, and upon the consent rule against those who do not appear; and if after satisfaction from one defendant for the costs, he take out execution against another, the court will interfere to prevent it. But it seems he cannot separate the costs, and tax part of them against one defendant, and part against another.(*b*)[1]

Where twelve defendants defended jointly, and entered into a joint consent rule, not specifying particularly the part for *which each defendant appeared, and at the assizes, two of the defendants were allowed by the judge to withdraw their plea, and to suffer judgment by default, but no amendment was made in the consent rule, and the case went on to trial, and the ten defendants proved their case, and obtained a verdict; it was held, that the order made at *nisi prius* should have specified the premises to be taken out of the consent rule, as well as the defendants who withdrew from the defence, and that this not having been done the plaintiff was entitled to have the verdict entered generally for him, and was entitled to the general costs of the cause, the writ of possession being limited to the premises in the occupation of the two defendants, and the ten defendants being entitled to the costs of defending for the premises to which they proved title.(*c*)

(*a*) Goodright d. Rowell *v.* Vice, Barn. 182.
(*b*) Thrustout d. Wilson *v.* Foot, B. N. P. 335; S. C., Barn. 149.
(*c*) Doe d. Bishton *v.* Hughes, 5 Tyr. 957; 4 Dow. P. C. 412.

[1] If the landlord, after being made a defendant in ejectment, in room of the tenants, be afterwards withdrawn, and the tenants admitted defendants in his stead, with the consent of the lessor of the plaintiff, and by their attorney they plead, &c., their attorney, though originally employed by the landlord, cannot afterwards make an agreement binding the landlord to pay the costs, in the event of a judgment against them; it not appearing that the attorney was either verbally or in writing authorized by the landlord to make such agreement. Herbert v. Alexander, 2 Call's Rep. 498.

Where there were several ejectments by one plaintiff, against different defendants, it was ruled, that a jury of view, appointed for each suit, should be paid for each. Wilcox v. ——, 1 Hayw. 484.

Where, on the trial of an ejectment on the several demises of A., and B., the plaintiff offered no evidence as to A.'s title, and the defendant (who was ignorant of B.'s title), had prepared evidence exclusively to meet the title of A.; and the verdict was found for the plaintiff on the demise of B., and for the defendant on the demise of A., and the master allowed the defendant his costs of the above evidence (notwithstanding an ineffectual attempt on the part of the defendant at the trial to use such evidence as applicable to B.'s title,) the court refused to order him to review his taxation.(*a*)

If the lessor of the plaintiff die after issue joined and before trial,[1] or even after trial and before taxation of costs, the defendant cannot recover his costs against the representative, the consent rule being (as already mentioned) merely personal; and it seems immaterial, whether the defendant's claim arises from a verdict in his favor, or from the plaintiff's being *non-suited upon the merits,(*b*)[2] or by reason of the defendant's refusal to confess; but where the plaintiff's lessor died after the trial, the defendant was compelled by the court to pay to his repre-

(*a*) Doe d. Smith and another *v.* Webber, 2 Ad. & Ell. 448.

(*b*) Thrustout *v.* Bedwell, 2 Wils. 7; Doe d. Lintot *v.* Ford, 2 Smith, 407; Doe d. Pain *v.* Grundy, 1 B. & C. 284.

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[1] The death of the lessor of the plaintiff, previous to the judgment in ejectment, is no ground for a writ of error *coram nobis*, notwithstanding that circumstance was not stated in the record, and no security for the costs was given; because an ejectment does not abate by the death of the lessor of the plaintiff. Purvis v. Hill, 2 Hen. & Munf. Rep. 614.

Where the lessor of the plaintiff in ejectment dies, pending the suit, judgment is to be rendered as if he were still living, and possession is to be given under the control of the court. Mooberry et al. v. Marye, 2 Munf. Rep. 453.

In ejectment, if the lessor of the plaintiff die, pending the suit, security for the costs must be given. Carter v. Washington et al., 2 Hen. & Munf. Rep. 31. In the case of Medley v. Medley, (3 Munf. Rep. 191,) the court, having decided that an appeal from a judgment in ejectment did not abate by the death of the lessor of the plaintiff, notwithstanding such lessor claimed the land for life only, reserved to the appellant the liberty to move for security for costs, without expressing an opinion of the propriety of his doing so. No motion for that purpose was made, and the judgment was afterwards affirmed without it. But, from the cases of Carter v. Washington et al., (2 Hen. & Munf. Rep. 31,) and Purvis v. Hill, (Ib. 614,) it appears, that security for costs, if required, must be given; but it is not error to proceed without it, if not required.

[2] Where the lessor of the plaintiff, having entered into the common rule to pay costs, died between the commission day and the trial, and the plaintiff was non-suited on the merits: held, that the executor of the lessor was not liable to pay the costs. Doe ex dem. Paine v. Grundy, 1 Barn. & Cress. Rep. 284.

Landlord, liable for costs. Farmers' Loan & Trust Co. v. Kursch, 1 Selden's Rep. 558.

sentative the costs, which had been taxed *by consent* upon the consent rule ;(*a*) and it would seem that if the lessor die pending a rule for a new trial, where the verdict has been in favor of the defendant, the court will not allow his representative to appear in support of the rule without giving security for costs.(*b*)

When the tenant appears, and there is a verdict and judgment against him, execution may be taken out thereon for the costs,[1] as in ordinary cases; and the lessor of the plaintiff may have a *capias ad satisfaciendum*, *or a *fieri facias*, for the costs. and [*336] an *habere facias possessionem* for the possession, separately, or in one writ, at his pleasure.(*c*)[2]

A judgment in ejectment is within the provisions of the stat. 48 Geo. III, c. 123, s. 1, which enacts, that all 'prisoners in execution for any *debt* or *damages* not exceeding 20*l*., (exclusive of costs,) shall be entitled to their discharge after having been in prison thereupon, for the space of twelve calendar months.(*d*)

When the judgment in ejectment is against a *feme sole*, who marries before execution, the plaintiff's lessor should sue out an *habere facias possessionem* in the maiden name of the defendant for the land, and then proceed by *scire facias* against the husband and wife for the costs.(*e*)

*When the landlord is made defendant without the tenant, the judgment to recover the possession is against the casual ejector; but, never-

(*a*) Goodright *v.* Holton, Barn. 149.
(*b*) Doe d. Cozens *v.* Cozens, 1 Q. B. R. 426.
(*c*) Appendix, No. 36, 37, 38, 39, 40.
(*d*) Doe d. Daffey *v.* Sinclair, 3 Bing. N. C., 778, and the cases there cited.
(*e*) Doe d. Taggart *v.* Butcher, 3 M. & S. 557; Appendix, No. 42.

[1] In ejectment, the execution for costs against the defendant properly issues in the name of the nominal plaintiff alone. Brown v. Demont, 9 Cow. Rep. 263.

To obtain leave to enter into the consent rule specially, the defendant in ejectment must apply to the court, and is, therefore, entitled to have the costs of such application taxed to his final bill of costs, if he be successful. Jackson ex dem. Prinder v. Lytle, 4 Cow. Rep. 16.

So, if the plaintiff discontinue. Ib.

[2] See Noland *v.* Seekright, 6 Munf. 185; Jackson *v.* Rathbone, 3 Cowen, 291; Griffith *v.* Dobson, 3 Pennsylv. 228; Jackson *v.* Hawley, 11 Wendell, 183; Smith *v.* Hornback, 3 A. K. Marsh, 392; Robertson *v.* Morgan, 2 Bibb. 148.

theless, as there is a judgment in existence against the landlord, execution may be taken out thereon for the costs.(*a*)

It may be collected, from the case of *Guliver* v. *Drinkwater*,(*b*) that, independently of these remedies, the lessor may, in all cases, recover the amount of his taxed costs(*c*) in an action for mesne profits: but that the court will not interfere to assist him, if the jury do not include such costs in their damages, when the lessor might have proceeded for them in a different manner.

[*337] When the verdict is found for the defendant, or the plaintiff is non-suited for any other cause than *the defendants not confessing lease, &c., the costs must be taxed on the postea, and marked on the consent rule, and personally demanded of the lessor, (the consent rule being at the same time shown to him,) and upon affidavit of such demand, and a refusal, an attachment may be obtained. It was formerly necessary to sue out a *capias ad satisfaciendum* against the nominal plaintiff,[1] and show that writ as well as the consent rule to the lessor; but this idle form is not longer necessary,(*d*) and the rule for the attachment is properly entitled, as in an action against the casual ejector, although obtained upon affidavits entitled, as in an action against the tenant.(*e*) When the lessor of the plaintiff irregularly sued out a writ of possession after the expiration of a year, without reviving the judgment by *scire facias*, he was not permitted to set off the costs on the judgment against the costs of the defendant for setting aside the execution.(*g*)[2]

(*a*) Appendix, No. 35.
(*b*) 1 T. R. 261.
(*c*) Doe *v.* Davis, 1 Esp. 358.
(*d*) Doe d. Prior *v.* Salter, 3 Taunt. 485; Doe d. Fry *v.* Fry, 2 Dow. P. C. 265.
(*e*) Rex *v.* Bryant, 2 Nev. & M. 666.
(*g*) Doe d. Stevens *v.* Lord, 7 Ad. & Ell. 614.

[1] To warrant an attachment against the lessors of the plaintiff, for not paying costs on judgment for the defendant upon a verdict, a *ca. sa.* against the nominal plaintiff, for the costs, must first be exhibited. The People v. Merrit, 7 Cow. Rep. 415.

[2] The demand of costs, under the rule *nisi*, for judgment, as in case of non-suit in ejectment, may be made upon any one of the lessors, or (as it seems) of the plaintiff's attorney. Jackson ex dem. Thompson et al. v. Thompson et al., 7 Cow. Rep. 426; Gilliland v. Morrell, 1 Caines' Rep. 154.

But it must not be made upon the agent of the attorney. Gilliland v. Morrell, 1 Caines' Rep. 154.

*When the declaration contained only one count and one demise, but claimed several messuages, and the jury found a verdict of *guilty* as to some, and *not guilty* as to one, the court held, that under the rule of Hiliary term, (2 Wm. IV. s. 74,) the defendant was entitled to his costs as to the messuage with respect to which the plaintiff had failed, and to have them set off against those of the lessor of the plaintiff.(*a*)

*If the lessor be a peer, an attachment may be obtained as against his goods and chattels for non-payment of costs upon the consent rule.(*b*) [*338]

In a case where baron and *feme* were lessors in ejectment, and the baron died after entering into the rule, the *feme* was held liable to the payment of the costs; because they were to be paid by the lessors of the plaintiff, and both of them were in the lease;(*c*) but of course during the life of both, the attachment can only be granted against the husband.(*d*)

Where the lessor was an infant, and the plaintiff was non-suited, and the infant's father, who prosecuted the suit, was dead, the court ordered the infant to pay the costs; yet, says the book, it was doubted, because of his infancy; but if the father had been alive, the court would have made him pay the costs, or, if he had left assets, his executor.(*e*)

*If the lessor of the plaintiff sue in *forma pauperis*, he will be dispaupered in case of vexatious delay; but it does not seem, that the court will also compel him to pay the defendant's costs.(*g*) [*339]

(*a*) Doe d. Errington *v.* Errington, 4 Dow. P. C. 602.
(*b*) Thornby d. Hamilton *v.* Fleetwood, Cas. Pr. C. P. 7.
(*c*) Morgan *v.* Stapeley, 1 Keb. 827.
(*d*) Doe d. Allanson *v.* Canfield, 6 Dow. P. C. 523.
(*e*) Anon., 1 Freem. 373.
(*g*) Doe d. Lippingwell *v.* Trussell, 6 East, 505.

A disseisee recovered judgment against the heirs of the disseisor, in a writ of entry, in which they pleaded that they did not disseise, and re-entered on his writ of seisin, within five years from the disseisin by the ancestor. Held, that the heirs were liable in trespass for the mesne profits accruing after the commencement of the writ of entry, (and so, it seems, they would have been, if they had been purchasers,) but not for those accruing between the decent cast, and their entry. As to those accruing between their entry and the commencement of the writ of entry: *Quære.* Emerson v. Thompson et al., 3 Picker. Rep. 473.

*When there are several defendants, the lessor of the plaintiff has his election to pay costs to which defendant he pleases.(a)

If the lessor proceeds under the stat. 1 Geo. IV. c. 87, s. 1, and is non-suited on the merits, or has a verdict pass against him, the defendant is entitled to double costs.

OF THE EXECUTION.[1]

According to the old authorities, when the lessor of the plaintiff prevails, he may enter peaceably upon the premises recovered, without any writ of execution,[2] but this doctrine is much shaken by the case of

(a) Jordan *v.* Harper, Stran. 516.

[1] The execution for costs in ejectment properly issues against the defendant, in the name of the nominal plaintiff alone. Brown v. Demont, 9 Cow. 263.

But when that execution is complained of, and trespass is brought for an act done under it, the action being not against the nominal plaintiff in the execution, but against the lessor for whose benefit it issued, there must be some collateral evidence to the latter with the execution. Ib.

A judgment for the plaintiff in ejectment generally terminates all presumption in favor of the defendant's title arising from prior possession. Jackson v. Tuttle, 9 Cow. 233.

A defendant in ejectment cannot, in general, transfer his possession so as to defeat execution in the ejectment suit; nor would a sale of his right on judgment and execution protect the purchaser in his possession. Ib.

But, otherwise, where a judgment in ejectment is obtained by cognovit, after a judgment at the suit of a creditor is docketed against the defendant in ejectment, under which his right is sold. In such case, the purchaser may hold or recover possession against the plaintiff in the ejectment, on the defendant's prior possession; and this even though the cognovit be given in pursuance of the award of arbitrators. Ib.

Though one has recovered in an ejectment, yet the recovery is not conclusive upon the defendant, or those claiming under him; and, accordingly, where, after a recovery in ejectment, the defendant's title was sold on judgment and execution, and the purchaser brought ejectment against the former recoverer in possession, who set up a mortgage against the former defendant, which proved to be usurious, and therefore void; held, that the purchaser should recover. Ib.

One setting up and claiming under a mortgage, admits the mortgagor's title at the execution of the mortgage; and proving the mortgage to be usurious, shows that such title was not affected by it. Ib.

[2] Where, in an ejectment, the confession of judgment does not determine the extent of the recovery, that must be ascertained by the court, and not by the clerk or sheriff. Bonta v. Clay, 1 Litt. Rep. 28.

A lessor in ejectment, after judgment, may enter peaceably, without a writ of possession; the judgment is evidence of his right of entry, as between the parties and privies, so as to protect him against an action of trespass, as long as the effect of the judgment continues. Jackson ex dem. Beekman et al. v. Haviland, 13 Johns. Rep. 229.

Doe d. Stevens v. *Lord*, and it would now be imprudent to attempt to take possession without suing out the regular writ.(*a*)[1]

(*a*) 7 Ad. & Ell. 610; Taylor d. Atkins *v.* Horde, Burr. 60, 88; Anon. 2 Sid. 155, 6.

But, after the expiration of the demise laid in the declaration, he cannot proceed to enforce his judgment. Ib.

Where there is a disclaimer entered for a part claimed in ejectment, the plaintiff may take out a writ of possession, of course, for that part. Squires v. Riggs, 2 Hayw. Rep. 150.

A defendant in ejectment cannot, in general, transfer his possession so as to defeat execution in the ejectment suit; nor would a sale of his right on judgment and execution protect the purchaser in his possession. Jackson ex dem. Hills v. Tuttle, 9 Cow. Rep. 233.

But otherwise, where a judgment in ejectment is obtained by *cognovit*, after a judgment at the suit of a creditor is docketed against the defendant in ejectment, under which his right is sold. In such case, the puschaser may hold or recover possession against the plaintiff in the ejectment on the defendant's prior possession; and this even though the *cognovit* be given in pursuance of the award of arbitrators. Ib.

If the jury give a general verdict for the plaintiff in ejectment, the court will order him to take possession of so much of the premises as he has given evidence of title to. Jackson ex dem. Moore v. Van Bergen, 1 Johns. Cas. 101.

No tenant, who was in possession anterior to the commencement of an ejectment, can be dispossessed, upon a judgment and writ of possession, to which he is not a party. Ex parte Reynolds, 1 Caines' Rep. 500.

And if a tenant, whose possession is distinct from that for which the action was brought, be turned out, he may have a writ of restitution. Ib.

On setting aside a default against the casual ejector, and a writ of possession issues thereon, the court will, on payment of costs, grant a writ of restitution. Jackson ex dem. Rosekrans v. Stiles, 1 Caines' Rep. 503.

If the defendant allege that the lessor of the plaintiff has taken possession of more land than was recovered by the verdict, the court will order a restitution. Jackson ex dem. Ostrander v. Hasbrouck, 5 Johns. Rep. 366.

But, if the plaintiff deny the fact, he will be allowed a feigned issue to try the question. Ib.

A judgment in ejectment never executed, and under which possession has never been surrendered, does not stop the running of the statute of limitations. Smith v. Hornback, 4 Litt. Rep. 233.

A possession taken under a judgment in ejectment, after the expiration of the demise laid in the declaration, without the assent of the defendant, is a trespass. Ib. 234.

Consent given by a defendant, without knowledge of these facts, and of the consequent extinction of right of the plaintiff in ejectment, would make the plaintiff tenant at will, or for one year. Ib.

If the plaintiff in an ejectment, having recovered a judgment, convey his right and title to another, the vendee is vested with the legal right of entry, and may take possession. Tribble v. Frame, 5 Litt. Rep. 187.

A judgment in ejectment cannot be enforced without process, although the plaintiff may enter on the land without such aid, and is not thereby guilty of a trespass, notwithstanding the provision of the occupying claimant law of 1812, [Kentucky,] forbidding the emanation of a writ of possession, until the commissioners appointed to assess the improvements, &c., had reported. Ib.

[1] The sheriff is not prevented from delivering the actual possession of the land by its being covered with water. Persine v. Bergen, 2 Green's Rep. 355.

[*340] *The writ of execution in ejectment is called the writ of *habere facias possessionem*,[1] and answers to the *habere facias seisinam* in real actions; for as in the one case, the freehold being recovered, the sheriff is ordered to give the demandant *seisin* of the lands in question, so also in the other case, the *possession* being recovered, the sheriff is commanded to give execution of the *possession*.(*a*)[2]

When the landlord defends, or if the plaintiff be non-suited because of his refusal to appear and confess, the lessor cannot sue out a writ of possession upon the judgment against the casual ejector without leave of the court, and only a rule to show cause is granted in the first instance. But if the plaintiff obtains a verdict and judgment, he may proceed to sue out a writ of possession on such judgment without any further order.(*b*)

When the writ of possession issues upon a judge's certificate, *under the authority of stat. 1 Wm. IV. c. 70, s. 37, it must, instead of the

(*a*) Appendix, No. 36 to 40.
(*b*) Doe d. Lucy *v.* Bennett, 4 B. & C. 897.

[1] After the demise laid in the declaration in ejectment is expired, no *habere facias possessionem* can issue, though the execution may have been suspended by injunction. Smith v. Hornback, 3 Marsh. Rep. (Ky.) 193.

There can be no *habere facias* after the expiration of the term; nor judgment for such execution. Wood v. Coghill, 7 Monroe's Rep. 601.

[2] The Revised Statutes of New York (part 3, chap. 5, tit. 1, sec. 27,) contain the following provision:

Sec. 27. "The plaintiff recovering judgment, shall be entitled to a writ of possession, which shall be substantially in the following form:

"The people, &c. To the sheriff, &c.

"Whereas A. B. has lately, in our supreme court of judicature, [or 'in the court of common pleas held in and for the county of ,' as the case may be,] by the judgment of the said court, recovered against C. D. one messuage, &c., [describing the premises recovered, with the like certainty as above provided,] which said premises have been, and are still unjustly withheld from the said A. B. by the said C. D., whereof he is convicted, as appears to us of record: and forasmuch as it is adjudged in the said court that the said A. B. have execution upon his said judgment against the said C. D., according to the force, form and effect of his said recovery; therefore, we command you, that without delay, you deliver to the said A. B. possession of the said premises, so recovered, with the appurtenances; and that you certify to, &c., at, &c., on, &c., in what manner you shall have executed this writ. [If there be costs to be collected, the proper clause may be here inserted, or a separate execution may be issued therefor.]

"Witness, &c."

A purchaser of lands, *pendente lite*, is subject to eviction without having been made a party. Long v. Morton et al., 2 Marsh Rep. (Ky.) 40. Hickman's Lessee v. Dale, 7 Yerger's Rep. 149.

usual recital of a recovery by judgment, recite as directed by the statute, *that the cause came on for trial at *Nisi Prius*, at [*341] such a time and place, and before such a judge, (naming time, place, and judge,) and that thereupon the judge certified his opinion that a writ of possession ought to issue immediately.(*a*)

If the lessor of the plaintiff be divested of his right of possession between the time when his demise is laid, and the time of issuing execution, it seems that the court will prevent him from issuing a writ of *habere facias possessionem*, or set one aside, if issued.(*b*)

The writ of possession is drawn up in general terms, commanding the sheriff to give to the plaintiff "the possession of his term, of and in the premises recovered in the ejectment;" but without any particular specification of the lands whereof he is to make execution; and as the description of the premises, in the demise in the declaration, is also too general to serve as a direction to the sheriff, it is the practice, for the lessor of the plaintiff, at his own peril, to point out to the sheriff the premises whereof he is to give him possession; and if the lessor take more than he has recovered in the action, the courts will interfere in a summary manner, and compel him to make restitution.(*c*)[1]

(*a*) Appendix, No. 37.

(*b*) Doe d. Morgan *v.* Bluck, 3 Campb. 447.

(*c*) Roe d. Saul *v.* Dawson, 3 Wils. 49; Doe d. Drapers' Comp. *v.* Wilson, 2 Stark. 477; ante, 21.

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[1] Where the plaintiff, on judgment by default against the casual ejector, on a writ of possession, took possession of the whole premises, it appearing that he had no title to three-sixths, he was ordered to restore so much to the defendant. Jackson ex dem. Sutherland et al. v. Stiles, 5 Cow. Rep. 418.

In ejectment, where the declaration, verdict and judgment are general, the plaintiff may take possession, at his peril, to any extent which he chooses, under the writ of *hab. fac. possessionem*, subject to be put right by the court, if he takes too much. Jackson ex dem. Eden et al. v. Rathbone, 3 Cow. Rep. 291.

But where the judgment is upon a special verdict, describing the premises, the plaintiff is confined to such location in the first instance, and the sheriff may refuse to give him possession beyond it. Ib.

"In executing the writ of possession, the plaintiff acts at his peril; and if he takes more than he has established his right to, the court will interfere in a summary way, and compel him to make restitution." (Per GREEN, J., delivering the opinion of the court.) Camden et al. v. Haskill, 3 Rand. Rep. 465.

The court, in their discretion, will set aside a writ of *habere facias possessionem* executed, and let in a landlord to try an ejectment on suggestion of collusion. Doe ex dem. The Grocers Company v. Roe, 5 Taunt. Rep. 205.

[*342] *They will also, if circumstances require, interfere before the execution of the writ, and restrain the lessor from taking possession of more than he is entitled to.[1] As where the lessor had declared for lands held under two separate titles, and by a mistake of the judge upon the law of the case, the verdict was given for the plaintiff upon both titles, when it ought to have *been entered for the defendant as to the lands comprised in one of them; the court confined the execution to the lands, to which the lessor had a valid title.(*a*)

The sheriff, it seems, previously to the execution of the writ, may demand an indemnity from the plaintiff;(*b*) and when he has to deliver possession of any particular number of acres, he must estimate them according to the custom of the country in which the lands are situated.(*c*)

The possession to be given by the sheriff, is a full and actual possession, and he is armed with all power necessary to this end. Thus, if the recovery be of a house, and he be denied entrance, he may justify breaking open the door, for the writ cannot otherwise be executed.(*d*)

(*a*) Doe d. Foster *v.* Wandlass, 7 T. R. 118, *in notis; et vide*, Brooke d. Mence *v.* Baldwin, Barn. 468; Roe d. Blair *v.* Street, 2 Ad. & Ell. 329.

(*b*) Gilb. Eject. 110.

(*c*) Roll. Ab. 886, H. 4.

(*d*) Semayne's case, 5 Co. 91,(*b*).

The practice in delivering possession of land recovered, is, for the sheriff to deliver it according to the directions of the plaintiff, who therein acts at his own peril. Simpson's Heirs v. Shannon's Heirs, 5 Litt. Rep. 322.

After a judgment has been obtained in Pennsylvania, in an action of ejectment for the non-payment of rent, and possession has been delivered, the court will not, on motion, restore the possession, on tender of the rent due, particularly when the amount due is disputed between the parties. Lessees of Camac v. Allwine, 1 Wash. Circ. Ct. Rep. 466.

[2] *Vide*, Jackson ex dem. Eden et al. v. Rathbone, 3 Cow. Rep. 291.

Several crops having been taken under an *habere facias possessionem* issued on an ejectment brought against a tenant for holding over, the court refused a rule for the lessor of the plaintiff to pay over the value of them to the defendant, after deducting the amount of rent due. Doe ex dem. Upton v. Witherwick, 3 Bingh. Rep. 11.

The growing crops of a tenant having been seized under a *fi. fa.*, a writ of *hab. fac. pos.* was subsequently delivered to the sheriff, in an action of ejectment at the suit of the landlord, founded on a demise made long before the issuing of the *fi. fa.* Held, that the sheriff was not bound to sell the growing crops under the *fi. fa.*, inasmuch as they could not, in point of law, be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration: held, also, that the sheriff had no right to allow the landlord a year's rent, under the statute of 8th Ann. c. 14, that statute contemplating an existing tenancy, which, in this case, must be taken to have ceased on the day of the demise in the ejectment. Hodgson et al. Assignees of Seton v. Gascoigne, 5 Barn. & Ald. Rep. 88.

If the lessor recover several messuages in the possession of different persons, the sheriff must go to each of the several houses, and severally deliver possession *thereof, (which is done by turning out the tenants;) for the delivery of the possession of one messuage, in the name of all, is not a good execution of the writ; since, the possession of one tenant is not the possession of the other.(a) But when the several messuages are in the possession of one tenant only, it is sufficient if he give possession of one messuage in the name of all.(b) [*343]

When the recovery is of land, the same distinction seems to prevail; that is to say, if there be only one tenant, a delivery of any part, in the name of the whole, will be sufficient; but *if there be more than one, a separate delivery of the lands in the possession of each tenant respectively must be made.(c)

If the officers be disturbed in the execution of the writ, the court will, on affidavit of the circumstances, grant an attachment against the party, whether he be the defendant, or a stranger:(d) and the writ is not understood to be completely executed, until the sheriff and his officers are gone, and the plaintiff is left in quiet possession.

In an old case where the sheriff returned, that in the execution of the writ, he removed all the persons whom, upon diligent search, he could find on the premises, and gave peaceable possession to the plaintiff, and that, immediately after he was gone, three men, who were secretly lodged in the house, expelled the *plaintiff, upon notice of which he returned to the house to put the plaintiff in full possesion, but met with such resistance that he could not do it, but at the peril of his life: the court held that the same was no execution, and awarded a new writ.(e) [*344]

In the old authorities we find it laid down, that if the lessor, after having had possession given to him by the sheriff, and before the writ of possession had been returned and filed, be again ousted by the de-

(a) 1 Roll. Ab. 886; H. 2.
(b) Floyd *v.* Bethill, 2 Roll. Rep. 420.
(c) 1 Roll. Ab. 886; H. 2.
(d) Kingsdale *v.* Man, 6 Mod. 27; S. C., Salk. 321.
(e) Upton *v.* Wells, 1 Leon. 145.

fendant, he shall have a new writ of possession, or an attachment,[1] and that the return of the writ is so much in the power of the plaintiff, that the court will not, at the instance of the defendant, direct it to be returned;[2] for the the return is left to the discretion of the plaintiff, that he may do what is most for his own advantage, in order to have the benefit of his judgment; the best way to effect which is, [*345] to permit him to renew the *execution at his pleasure, until full *execution be obtained.(*a*) But this doctrine is much limited by recent decisions; and the courts will not now grant a second writ of possession after the first has been executed, unless the expulsion shall take place within a short period after the execution, and shall be clearly brought home to the original defendants. A second writ has been granted where the expulsion was within a few days of the original execution, and refused where a period of fifteen months had elapsed; and where the party only swore to his belief that the parties committing the violence were combining with the defendants, the affidavit was held to be insufficient.(*b*)[3]

(*a*) Rex *v.* Harris, Ld. Raym. 482; Molineaux *v.* Fulgam, Palm. 289; Ratcliffe *v.* Tate, 1 Keb. 776; Loveless *v.* Ratcliff, 1 Keb. 785; Devereux *v.* Underhill, 2 Keb. 245; Fortune *v.* Johnson, Styl. 318; Pierson *v.* Tavenor, 1 Roll. Rep. 353; Davies d. Povey *v.* Doe, Blk. 392; Anon., 2 Brown, 253; Kingsdale *v.* Mann, 6 Mod. 27; S. C, Salk. 321; Goodright *v.* Hart, Stran. 830.

(*b*) Doe d. Pate *v.* Roe, 1 Taunt. 55; Doe d. Thompson *v.* Mirehouse, 2 Dow. P. C. 200; Doe d. Lloyd *v.* Roe, 2 Dow. N. S. 407.

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[1] If a plaintiff, who has recovered in ejectment, an undivided proportion of land, and received possession thereof from the sheriff, ousts the defendant of the whole, after the return day of the *habere facias*, the court will not restore the defendant in a summary way. Gardiner v. Schuylkill Bridge Co. 2 Binn. Rep. 450.

Aliter, if there is an ouster in fact before the return day. Ib.

If a plaintiff is dispossessed by a person claiming under the defendant's title after he has been put into possession under a writ of *habere facias possessionem*, an *alias* will be awarded provided there is no pretence of a collusion between the plaintiff and defendant as to the judgment, although the return day of the *habere facias* has not arrived. Jackson v. Hawley, 11 Wen. 182.

[2] The court will not rule the marshal to return the *habere facias possessionem*. Penn's Lessee v. Kline, Circ. Ct. U. S. P. April, 1821, MSS. (Cited in Coxe's Digest, p. 272.)

The defendant in ejectment cannot rule the marshal to return the *habere facias possessionem*, though the plaintiff may. The reason is, that if not returned, and the plaintiff, after the writ is executed, should be again turned out by the defendant, he may, on suggestion that *vice comes non misit breve*, sue out an *alias*, and be restored to his possession.

In case he is turned out by a stranger, he cannot pursue this course, but must resort to his ejectment or forcible entry. United States v. Slaymaker, Circ. Ct. U. S. P. October, 1821, MSS. (Cited in Coxe's, Digest, pp. 372, 373.)

[3] If a writ of *habere facias possessionem* be once returned executed, no *alias* can issue,

*If the lessor neglect to sue out his writ of possession for a [*246] year and a day after judgment, he must revive the judgment by *scire facias*,[1] as in other cases; and when the judgment is against the casual ejector, the ter-tenant must be joined in the writ.(*a*)

When a sole defendant in ejectment dies after judgment, and before execution, it has been doubted whether a *scire facias* is necessary, because the execution is of the land only, and no new person is charged ;(*b*) but the surer method is, notwithstanding, to sue out a *scire facias*. And as a *scire facias* for the land must issue against the ter-tenant, whoever he may be, it will be also necessary to sue out another *scire *facias* for the costs against the personal representative, unless he be himself the ter-tenant.(*c*)[2]

(*a*) Withers *v.* Harris, Ld. Raym. 806; Appendix, No. 42.

(*b*) Per Holt, C. J., Withers *v.* Harris, Ld. Raym, 806; *sed vide*, Proctor *v.* Johnson, 2 Salk. 600; S. C., Ld. Raym. 669.

(*c*) Doe d. Taggart *v.* Butcher, 3 M. & S. 557.

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for then the execution is of record, and the writ is *functus officio*. United States v. Slaymaker, Circ. Ct. U. S. P., Oct. 1821, MSS. (Cited in Coxe's Digest, p. 273.) Deut v. Simmons, 7 Marsh Rep. 42. (New Series.)

If an *alias* issue on a suggestion of *vice comes non misit breve*, it is an offence in a party to resist its execution, but not so if the first writ had been returned executed, for then the *alias* was irregular. Ib.

The writ of *habere facias possessionem*, cannot be executed after the return day, and resisting an attempt thus irregularly to execute it, is not criminal. Ib.

[1] Upon a judgment in ejectment, if execution of the writ of *habere facias possessionem* be prevented for several years by injunction, the plaintiff is entitled to the writ, on motion, upon a rule to show cause, without a *scire facias;* provided, not more than a year has elapsed since the affirmance by the court of appeals of the decree dissolving the injunction, and dismissing the bill in chancery. Nolan v. Seekright, Lessee of Cromwell, 6 Munf. Rep. 185.

In such case, if the term laid in the declaration have expired, pending the proceedings on the injunction, the court to which the motion is made for the writ of *habere facias possessionem*, may cause the term to be enlarged, and award the writ upon a rule to show cause served upon the defendant. Ib.

In a *scire facias*, brought to obtain an execution on a former judgment in ejectment, it is incompetent for the defendant to controvert the title determined by such judgment. Bradford v. Bradford, 5 Conn. Rep. 127.

To a *scire facias*, to revive a judgment in ejectment, for the term and damages, the defendant cannot plead a conveyance by the lessor of the plaintiff, made subsequent to the judgment. Lessee of Penn v. Klyne et al., 1 Peters' Cir. Ct. Rep. 446.

After a conveyance by the lessor of the plaintiff to a third person of land for which judgment had been obtained, a *scire facias*, or a *habere facias*, must issue in the name of the original plaintiff. Ib.

[2] A judgment in ejectment for the term, damages, and costs, cannot be revived by *scire*

When the judgment in ejectment is against a *feme sole*, who marries before execution, the plaintiff's lessor should sue out an *habere facias possessionem* in the maiden name of the defendant for the land, and then proceed by *scire facias* against the husband and wife, for the costs.(*a*)

If the lessor of the plaintiff die after the *teste* of the writ, but before it is actually sued out, it is not necessary to revive the judgment by *scire facias;* and as he is not a party on the record, it seems no [*347] *scire facias* would be necessary, if he died before the *teste* *of the *habere facias possessionem*, although the case of *Doe d. Beyer* v. *Roe*,(*b*) has certainly left this point somewhat doubtful.

When the sheriff delivers possession of the land under the writ of *habere facias possessionem*, he thereby also delivers possession of the crops upon it; and such crops will pass to the lessor, although severed at the time of the execution of the writ, provided such severance has been made subsequently to the determination of the tenant's interest, and of the day of the demise in the declaration.(*c*) And the growing crops will also pass to the lessor by the execution of the writ of possession, although previously seised under a *fieri facias* against the tenant, if the day of the demise be prior to the issuing of such *fieri facias*, inasmuch as they cannot be said to belong to the tenant, who is a trespasser from that day.(*d*)

*Where the landlord, after a recovery in ejectment, distrained on the tenant for rent which became due after the verdict, and which the tenant paid, the court refused to stay the execution, saying that the tenant ought to have disputed the distress.(*e*)

(*a*) Doe d. Taggart v. Butcher, 3 M. & S. 557.
(*b*) Burr. 1870.
(*c*) Doe d. Upton *v.* Witherwick, 3 Bing. 11.
(*d*) Hodgson *v.* Gascoigne, 5 B. & A. 88.
(*e*) Doe d. Holmes *v.* Davies, 2 Moore, 581.

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facias against the heirs alone, the personal representatives must also be made defendants. Mitchell v. Smith, 1 Litt. Rep. 245.

A *scire facias* cannot issue against the representatives of a deceased defendant without making the survivors parties. Ib.

To revive a judgment against two, one of whom has died, *scire facias* must be issued against the heirs of the deceased, and the terre-tenants or survivor. Griffith's heirs v. Wilson, 1 Marsh. Rep. 209. (New Series.)

Persons who enter as tenants after judgment in ejectment are necessary parties to a *scire facias* to revive the judgment. Lansford v. Turner, 5 Marsh. Rep. 105. (New Series.)

OF THE WRIT OF ERROR.[1]

A writ of error in ejectment cannot be brought in the name of the casual ejector,(*a*) and consequently it will not lie until after verdict; for, before appearance, the casual ejector is the only defendant in the suit, and, after appearance, the new defendant is bound by the terms of the consent rule to plead the *general issue.(*b*) If, [*348] also the defendant refuse at the trial to confess, &c., he will be precluded from bringing error, because the plaintiff will then be non-suited as to him, and the judgment will be entered against the casual ejector.(*b*)

When indeed the landlord defends alone, and the verdict is found against him, error may be brought, notwithstanding that the judgment, upon which the execution issues, is entered against the casual ejector:(*b*) for a judgment is also in existence against the landlord, and upon that judgment, the writ of error may be taken out in the landlord's name. To enable him, however, to proceed with the writ of error, he must, it seems, obtain a rule to stay the plaintiff from taking out execution against the casual ejector; and if he omit to do this, and suffer a regular execution to take place, the court will not, on a subsequent motion, order the execution to be set aside.(*c*)

(*a*) Roe d. Humphreys *v.* Doe, Barn. 181; Doe d. Faithful *v.* Roe, 7 Dow. P. C. 916.
(*b*) Ante, 223.
(*c*) George d. Bradley *v.* Wisdom, Burr. 756.

[1] In the state of New York, writs of error in civil actions, as they have heretofore existed, are abolished; and the only mode of reviewing a judgment or order in a civil action is that prescribed by title 11 of the Code. See N. Y. Code of 1852, sec. 323.

A writ of error may be brought in the name of the casual ejector. Roe v. Bank of the United States, Ohio Con. Rep. 460.

The defendant cannot assign as error that the writ of ejectment is not signed by the prothonotary, if it is under seal. This defect is cured by appearance and pleading to issue, and by the act of assembly prescribing a writ of ejectment. Benjamin v. Armstrong, 2 Serg. & R. Rep. 292.

As in action of ejectment, a deed under which the plaintiff claims no title may be given in evidence to prove boundary. It is no ground for reversing a judgment in the court of appeals, that the inferior court admitted a deed to be read in evidence, by which, according to law, no title to any land could pass. Lander v. Reynolds, 2 Litt. Rep. 15.

For the purpose of avoiding a new trial where the finding is for too much, the plaintiff in ejectment may enter a *remittitur*. M'Allister v. Mullanphy, 3 Mis. 38.

*By statutes 16 and 17 Car. II. c. 8, ss. 3 and 4, it is enacted, that no execution shall be staid by writ of error, upon any judgment after verdict in ejectment, unless the plaintiff in error shall become bound in a reasonable sum to pay the plaintiff in ejectment all such costs, damages, and sums of money, as shall be awarded to such plaintiff, upon judgment being affirmed, or on a non-suit, or discontinuance had; [*349] and, in case of affirmance, discontinuance, or non-suit, *the court may issue a writ to inquire, as well of the mesne profits, as of the damages by any waste committed after the first judgment; and are, upon the return thereof, to give judgment and award execution for the same, and also for costs of suit.

The words of this statute seem to render it necessary for the plaintiff in error to be *personally* bound;[1] but, by a reasonable construction, it is held sufficient, if he procure proper sureties to enter into the recognizance of bail, for otherwise lessors residing in distant counties would sustain great inconvenience, and an infant lessor, or a lessor becoming a *feme covert* after action brought, would be entirely excluded from the benefit of the act.(*a*) But, although the sureties may be examined as to their sufficiency, the plaintiff in error cannot; and, therefore, where the lessor of the plaintiff swore that the defendant was insolvent, and also that he (the lessor) had a mortgage upon the land for more than it was worth, the court still held, that the defendant's recognizance was sufficient to entitle him to his writ of error.

The plaintiff in error is not bound to give the defendant in error notice of his entering into the recognizance pursuant to stat. 16 and 17 Car. II. c. 8, s. 3;(*b*) and by a recent rule(*c*) †the sum in which [*350] the recognizance is to be taken under this statute, is *double

(*a*) Barnes *v.* Bulmer, Carth. 121; Lushington d. Godfrey *v.* Dose, 7 Mod. 304; Keene d. Lord Byron *v.* Deardon, 8 East, 298.
(*b*) Doe d. Webb *v.* Goundry, 7 Taunt. 427.
(*c*) Reg. Gen. Hil. Term, 2 W. 4.

[1] The plaintiff in error in ejectment is not bound to give the defendant in error notice of his entering into the recognizance pursuant to 16 and 17 Car. II., c. 8, s. 3, to pay costs on affirmance. Doe on demise of Webb v. Goundry, 7 Taunt. Rep. 427.

The plaintiff in error in ejectment is not required to find bail to join in his recognizance to pay costs, on affirmance. Ib.

the yearly value of the premises in dispute, and double the costs of the ejectment.(*a*)[1]

The writ of error does not operate as a stay of execution until bail is put in, which cannot be done until the plaintiff's lessor has taxed his costs, for until costs are taxed, the amount of the penalty of the recognizance of the bail in error cannot be fixed; and if the lessor choose to waive his taxation of costs, and proceed for his possession only, the court will not interfere to prevent him, notwithstanding the allowance of the writ of error.(*b*)

Where the tenants in possession, having undertaken to appear on the usual terms, and also to take short notice of trial, made no defence at the trial, but sued out a writ of error, when the judgment was signed; the court, on motion, allowed the lessor to take his judgment and execution against the casual ejector, notwithstanding the pendency of the writ of error.(*c*)

In the case of *Wharod* v. *Smart*,(*d*) the defendant brought a writ of error in Parliament, and the court compelled him to enter into a rule "not to commit waste, or destruction, during the pendency of the writ of error."

When the plaintiff's lessor proceeds against the bail by action on the recognizances, they are not *chargeable with the [*351] mesne profits under stat. 16 and 17 Car. II. c. 8, s. 4, unless their amount has been first ascertained by writ of inquiry pursuant to the provisions therein contained.(*e*)

*After a recovery in ejectment, the lessor of the plaintiff may peaceably enter, pending a writ of error, if he find the premises vacant; but he cannot enter by force, nor take out a writ of execution.(*g*)

(*a*) Thomas *v.* Goodtitle, Burr. 2501; Keene d. Lord Byron *v.* Deardon, 8 East, 298.
(*b*) Doe d. Messiter *v.* Dinley, 4 Taunt. 289.
(*c*) Doe d. Morgan *v.* Roe, 8 Bing. 169.
(*d*) Burr. 1823.
(*e*) Doe *v.* Reynolds, 1 M. & S. 247.
(*g*) Badger *v.* Floyd, 12 Mod. 398; Recog. in Withers *v.* Harris, Ld. Raym. 806, 8.

[1] The practice has been to take a recognizance in double the annual rent of the premises, when that can be ascertained. Doe on demise of Webb v. Goundry, 7 Taunt. Rep. 427.

OF BRINGING A SECOND EJECTMENT.

We have now traced the proceedings in this action, from the commencement to the conclusion; and it only remains to add a few remarks respecting the bringing of a new, or second ejectment.

It has already been observed, that a judgment in ejectment confers no title upon the party in whose favor it is given; it is manifest, therefore, that the judgment can never be final;[1] and that it is always in the power of the party failing, whether claimant or defendant, to bring a new action.[2] The structure of the record also renders it impossible to plead a former recovery in bar of a second ejectment:[3] for the

[1] A former judgment in ejectment against a tenant in possession, creates no estoppel to a title since acquired by him, from one who was not a party or privy to such judgment. Bradford v. Bradford, 5 Conn. Rep. 127.

A former judgment in an action of ejectment, wherein the plaintiff declared merely, that he was "well seised and possessed of the premises," will not estop the defendant in that action from setting up, in another action, a title in fee. Ib.

A former judgment in ejectment by default in favor of the plaintiff, creates no estoppel to the defendant's title; because, if the defendant had pleaded the general issue, and there had been a verdict for him, it would have created no estoppel to the plaintiff's title; and it is an indispensable requisite of an estoppel that it be reciprocal. Ib.

Whether the verdict and judgment in one action of ejectment is a bar to a recovery in another? Hammond v. Ridgeley's Lessee, 5 Harr. & Johns. Rep. 245, 267.

Though one has recovered in an ejectment, yet the recovery is not conclusive upon the defendant or those claiming under him. And accordingly, where, after a recovery in ejectment, the defendant's title was sold on judgment and execution, and the purchaser brought ejectment against the former recoverer in possession, who set up a mortgage against the former defendant, which proved to be usurious, and therefore void: held, that the purchaser should recover. Jackson ex dem. Hills v. Tuttle, 9 Cow. Rep. 233.

A verdict and judgment in ejectment, is never conclusive even between the immediate parties, except in an action for mesne profits. (Per Colden, Senator.) Hopkins v. M'Lauren, 4 Cow. Rep. 667.

[2] After a plaintiff has obtained judgment in ejectment for a moiety of land, he may sustain a new ejectment for the whole, against the same parties, without taking possession, or suing out a writ of possession, or using any means to enforce the former judgment. But if a party, after recovering in ejectment, harass the defendant by a new ejectment, when he is willing to surrender, such defendant might obtain relief on motion. Rambler et al. v. Tryon et al., 7 Serg. & R. Rep. 90.

One verdict and judgment, and one award of arbitrators, under the act of 20th March, 1810. [Pennsylvania,] in favor of the same party, are not a bar to another ejectment by the other party. Ives et al. v. Lett et al., 14 Serg. & R. Rep. 301.

[3] Two verdicts and judgments, and seventeen years' acquiescence, are not a bar to an ejectment at common law. White et al. v. Kyle's lessee, 1 Serg. & R. Rep. 515.

Nor, where several verdicts have passed in favor of the one party, and the other party

plaintiff in the suit is only a fictitious person, and as the demise, term, &c., may be laid many different ways, it cannot be made appear that the second ejectment is brought upon the same title as the first.

It is said by Mr. Serjeant Sellon, in his practice of the courts,(a) "that it has sometimes been attempted in Chancery, [*352] after three or four ejectments by a *bill of peace* to establish the prevailing party's title; yet it hath always been denied, for every *termor* may have an ejectment, and every ejectment supposes a new demise, and the *costs* in ejectment are a recompense for the trouble and expense to which the possessor is put. But that where the suit begins in Chancery for relief touching pretended incumbrances on the title of *lands, and the court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the court, the court hath ordered a *perpetual injunction* against the defendant, because there the suit is first attached in that court, and never began at law; and such precedent incumbrances appearing to be fraudulent, and inequitable against the possession, it is within the compass of the court to relieve against it." It should seem, however, from the cases of *Barefoot* v. *Fry*,(b) and *Leighton* v. *Leighton*,(c) that courts of equity will sometimes interfere, and grant per-

(a) 2 Sell. Prac. 144.
(b) Bunb. 138.
(c) 1 P. Wms. 671.

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has accepted a lease of him, is the losing party concluded. Richardson v. Lessee of Stewart, 2 Serg. & R. Rep. 87.

But, after three trials, in which similar verdicts had been found, the court said they would stay further proceedings. Lessee of Cherry v. Robinson, 1 Yeates' Rep. 521.

[And now it is provided, by the act of the 13th April, 1807, sec. 4, (4 Sm. Laws, 477,) that two verdicts in ejectment on the same side, and judgment rendered thereon, shall be conclusive.]

No verdict and judgment in ejectment can be relied on as a bar to subsequent ejectment, though for the same land, and between the same defendants and lessors of the plaintiff, the fictitious plaintiffs being not the same. Pollard v. Baylords et al., 6 Munf. Rep. 433.

The New York Revised Statutes (pt. 3, ch. 5, tit. 2, sec. 14,) provide, that a judgment in ejectment, obtained by either party, shall be conclusive against the other party, as to the title established in such action, and also against all persons claiming under such party by title accruing subsequently to the service of the notice. And, in such case, the defendant is not entitled to demand (as, of course, he may do in an ordinary action of ejectment) that the judgment be vacated, and that a new trial be granted on payment of the costs and damages; the judgment being conclusive, unless a new trial be granted, as in ordinary actions for errors of law or fact. 12 Wen. Rep. 258.

petual injunctions, when the ejectments have been commenced in the usual way at the common law.(*a*) And in one case, where, upon a most vexatious prosecution of ejectments, the court of Chancery refused to grant a perpetual injunction, upon an appeal to the House of Lords the injunction was allowed.(*b*)

(*a*) Deardon *v.* Lord Byron, 8 Price, 417.
(*b*) Earl of Bath *v.* Sherwin, Bro. Cas. Parl. 270.

*CHAPTER XI.

Of Staying the Proceedings in the Action of Ejectment.

THE discretionary power exercised by the courts in the regulation of ejectments, is frequently called forth by applications from the defendant, to stay the proceedings in the action;[1] and a separate consideration of the cases in which these applications have been granted, seems preferable to intermixing them with the detail of the regular practice.[2]

When the ejectment is brought on the forfeiture of a lease, the proceedings will be stayed upon the application of the tenant, until the lessor of the plaintiff has delivered particulars of the breaches of covenant, on which he intends to rely; and a summons for this purpose will be granted before the tenant has appeared to the action, or entered into the consent rule.(*a*)

When the lessor of the plaintiff is an infant, the court will stay the proceedings until security be *given for the costs, unless a responsible person has been made the plaintiff in the suit, or the father, or guardian undertake to pay them; but an inquiry as to these facts should be made previously to the application.(*b*) The pro- [*354]

(*a*) Doe d. Birch *v.* Phillips, 6 T. R. 597.

(*b*) Noke *v.* Windham, Stran. 694; Throgmorton d. Miller *v.* Smith, Stran. 932; Anon., 1 Wils. 130; Anon., 1 Cowp. 128; Doe d. Roberts *v.* Roberts, 6 Dow. P. C. 556; Appendix, No. 43.

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[1] In ejectment, where the tenant, after suit brought, offers to surrender the premises, to pay the costs, and to enter into a stipulation as to mesne profits, giving the plaintiff the same rights as if judgment was rendered against the cusual ejector, the court will stay the proceedings. Jackson ex dem. Wood v. Stiles, 3 Wen. Rep. 429.

[2] Pending the action, the premises were sold under a mortgage, and purchased by M., to whom the defendant, for a valuable consideration, delivered possession, and afterwards went to the clerk's office and confessed judgment, on which a *habere facias possessionem* was issued, and possession delivered to the plaintiff. On motion, the judgment and execution were set aside, and the cause reinstated; but, as the substitution of M., as the defendant, would have ousted the court of its jurisdiction, the court ordered that the suit should stand n the name of the original parties, and that M. should give surety for the costs, &c. Lessee of Thomas v. Newton, 1 Peter's Circ. Ct. Rep. 444.

ceedings will also be stayed until security be given for the costs, when the lessor resides abroad ;(*a*)[1] and, in a case where an ejectment was brought upon the demise of a person resident in Ireland, the court of King's Bench stayed *the proceedings until security should be given for the costs, although it was an ejectment, brought under the direction of the Court of Chancery, where the bill was retained until after the trial of the ejectment, and security had already been given there to the amount of 40*l*.(*b*) And when the lessor is unknown to the defendant, the latter may demand an account of his residence, or place of abode, from the lessor's attorney, and if he refuse to give it, or give a fictitious account of a person who cannot be found, proceedings will be stayed until security for the costs be given.(*c*) But these are the utmost limits to which the courts will go, in granting rules of this nature ; [*355] and an application has been refused, founded on the *poverty of the lessor ;(*d*) so, also, one in which an ejectment had previously been brought in another court and abandoned, and which the lessor had been obliged to give security, because his residence was then unknown.(*e*) So, also, one in which the lessor was an uncertificated bankrupt, and in which the assignees having declined to proceed with the action, it was carried on for the bankrupt's benefit.(*g*) And it has been holden, that the death of the lessor after verdict, and pending a rule for a new trial, is not a sufficient ground for an application of this nature, where the lessor claimed in fee,(*h*) though where he claimed only as tenant for life, the court required security to be given.(*i*)

The practice of granting these rules originated in the court of King's Bench, and were indeed at first entirely confined to cases of infant lessors.(*k*)

(*a*) B. N. P. 111; Appendix, No. 44.
(*b*) Denn d. Lucas *v.* Fulford, Bur 1177.
(*c*) Tidd's Prac. 476, 7.
(*d*) Goodright d. Jones *v.* Thrustout, Cas. Pr. C. P. 15.
(*e*) Doe d. Selby *v.* Alston, 1 T. R. 491.
(*g*) Doe d. Colnagni *v.* Blick, 7 Scott, 714.
(*h*) Doe d. Cozens *v.* Cozens, 9 Dow. P. C. 140.
(*i*) Thrustout d. Turner *v.* Grey, Stran. 1056.
(*k*) Thrustout d. Dunham *v.* Percival, Barn. 183.

[1] In ejectment, where some of the lessors of the plaintiff reside out of the state, and others in it, the court will not stay proceedings until security for costs is given. Anon., 2 Penn. Rep. 886.

*The proper time to take out a summons, or move the court for this rule, is after plea pleaded.(*a*)

The next case, in which the courts interfere to stay the proceedings, is when the costs of a prior ejectment upon the same title, or between the same parties, are left unpaid.(*b*)

For some time after the introduction of this practice, the court would not interfere unless the two ejectments were brought in the same court;(*c*) but this limitation no longer prevails, and it is now immaterial in what court the first ejectment is brought.(*d*) Formerly, also, there was a diversity of opinion, whether the proceedings could be stayed, where the two ejectments were brought (without fraud or collusion) upon *different demises although upon the same [*356] title;(*e*) but it is now of no consequence whether the two ejectments are brought upon the demise of the same or different persons, against all or some of the same parties, or for the same or different premises, provided they are brought upon the same title, and for the recovery of part of the same estate.[1] Thus, proceedings have been

(*a*) 2 Sell. Prac. 139.

(*b*) Append. No. 45.

(*c*) Austine *v.* Hood, 1 Sid. 279; Tredway *v.* Harbert, Comb. 106.

(*d*) Doe d. Hamilton *v.* Atherly, 7 Mod. 420; Anon., 1 Salk. 255; Holdfast d. Hattersley *v.* Jackson, Barn. 133; Doe d. Chadwick *v.* Law, Blk. 1158; Doe d. Walker *v.* Stephenson, 3 B. & P. 22.

(*e*) Short *v.* King, Stran. 681; Tredway *v.* Harbert, Comb. 106.

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[1] Proceedings in ejectment were stayed until costs of a former ejectment between the same parties should be paid. Bull's Lessee v. Sherdine, 1 Harr. & Johns. Rep. 206. Den v. Thompson, 2 Green's Rep. 193.

The court will not stay proceedings in ejectment, till the costs of a former ejectment are paid, unless it appear that the same title was or might have been tried in the former suit. Jackson ex dem. Gouverneur et al. v. Stiles, 2 Cow. Rep. 596.

And where W. brought an ejectment against T., and G. sought to be admitted to defend as landlady of T., which was denied, because T. was the tenant of W.; on G.'s bringing ejectment against T., held, that the proceedings should not be stayed in the second ejectment, till G. had paid the costs of the first. Ib.

Where the tenant of the lessors in an action of ejectment, defended a former ejectment, brought against him, but failed, and had judgment against him for costs, and was turned out of possession upon an *habere facias possessionem*, and the same lessors afterwards brought an ejectment against the lessor of the plaintiff in the first suit, for the same premises and upon the same title; the court ordered the proceedings in the second action to stay, until the costs of the first were paid. Jackson ex dem. Livingston v. Edwards, 1 Cow. Rep. 138.

stayed where one of the lessors in the first action died before the commencement of the second; where in the second ejectment two trustees were added to the lessors; where part of the lands were occupied by new tenants; where the second action was between the heir of the plaintiff's lessor, and the heir of the defendant in the first action; where the two actions were between the devisees of the respective parties;(*a*) where one of the lessors released his claim to *the defendants after the first action on a money consideration, and a covenant on their parts to suspend against him their claim for costs, and the second ejectment was

(*a*) Doe d. Hamilton *v.* Hatherly, Stran. 1152; Thrustout d. Williams *v.* Holdfast, 6 T. R. 223; Keene d. Angel *v.* Angel, 6 T. R. 740; Doe d. Feldon *v.* Roe, 8 T. R. 645; Doe d. Thomas *v.* Shadwell, 7 Dow. P. C. 527; Doe d. Mudd *v.* Roe, 8 Dow. P. C. 444.

And this will be done, although one of the lessors in the second action had not demised to the defendant in the first. Ib.

Thus, where E. brought ejectment against B., who held as tenant of others, upon which E. had judgment, and turned B. out of possession: in ejectment by C. and those others, for the same premises, against E., proceedings were ordered to stay, till E.'s costs of the first suit should be paid. Jackson ex dem. Livingston v. Edwards, 1 Cow. Rep. 138.

Where A. and B. bring ejectment and have judgment against them for costs, though C. afterwards bring ejectment for a portion of the same premises upon the same title; yet the court will not stay proceedings in the second suit till the costs of the first be paid. Jackson ex dem. Clark v. Clark, 1 Cow. Rep. 140. Contra, to the rule in text.

The court will not compel the defendant in ejectment to proceed to trial, until the costs of a former suit, in which the plaintiff had been non-prossed, are paid. Hurst's Lessee v. Jones, 4 Dall. Rep. 353.

Where a rule has been obtained for staying the proceedings in ejectment till the costs of the former ejectment have been paid, the court will not interfere, and permit the defendant, in case those costs are not paid before a certain day, to be named by the court, to *non pros.*, the ejectment pending. Doe ex dem. Sutton v. Ridgway, 5 Barn. & Ald. Rep. 523.

Semble. That the court will not stay the proceedings in an ejectment until the costs of a former ejectment are paid, if it appear that the verdict was obtained by fraud and perjury. Doe ex dem. Rees v. Thomas, 2 Barn. & Cres. Rep. 622.

In the case of Chatfield & Wife, demandants, v. Stouters, tenants, (3 Bingh. Rep. 167,) Wilde, Serjt., had obtained a rule calling on the demandants to show cause why all further proceedings on a writ of right should not be stayed until the tenant's costs of an ejectment brought for the said premises were satisfied, in which ejectment the lessors of the plaintiff, after entering the cause for trial in 1816, withdrew the record.

Pell, Serjt., who was to have shown cause, was stopped by the court, who called on

Wilde, to support his rule. [Gaselee, J., referred to the note in 3 Bosanquet & Puller, 23.]

Best, C. J. "The abandonment of the ejectment was no decision on the merits, and the court has no power to stay the proceedings in a writ of right, till the costs of a prior ejectment are paid; it is a totally different proceeding. The rule often operates with hardship in ejectment, and it would be more liable to do so in a writ of right, by preventing a party who was poor from asserting his title."

The rest of the court concurring, the rule was discharged.

brought by the heir of the other claimant;(*a*) where the second action was brought by the assignees of an insolvent debtor, the costs of the first ejectment having been inserted as a debt in the insolvent's schedule;(*b*) and where the second ejectment was brought by the lessee of an insolvent who had been the lessor in the first action, and it appeared that the assignment was fraudulent, to evade the payment of the costs.(*c*)

A distinction was also formerly taken as to the situation of the parties in the different actions, and it was holden, that if the defendant in the second *ejectment had been the claimant in the [*357] first, the proceedings should not be stayed:(*d*) but this doctrine is now also exploded, and the change of situation in the parties is immaterial.(*e*) The rule will also be granted, whether the merits be decided in the former action, or whether there be a judgment of nonsuit, or of *non-pros*, or even if the first action be discontinued before the consent rule, or plea:(*g*) nor is the length of time which elapses between the two actions any bar to the rule.(*h*)

The courts will likewise stay the proceedings in a second ejectment until the costs of a former one be paid, if the conduct of the party has been vexatious or oppressive, although he is not liable to the costs of the first action. Thus, where the *lessor in the second action was also the lessor in the first, and had refused, after the appearance of the defendant in such first action, to enter into the consent rule, whereby, although non-suited for want of a replication, he was exempted from the costs of the defendant's appearance, the court would not let him proceed until he had satisfied the defendant for the expenses of such first appearance.(*i*) And, upon the same principle, where the first ejectment was on the demise of the husband and wife, but the husband alone entered into the consent rule, *and judgment given [*358] in the Common Pleas for the defendant, was affirmed in the

(*a*) Doe d. Rees *v.* Thomas and another, 4 Add. & Ell. 348.

(*b*) Doe d. Standish *v.* Roe, 5 B. & Ad. 878; Doe d. Heighley *v.* Harland, 10 Ad. & Ell. 761.

(*c*) Doe d. Chadwick *v.* Law, Blk. 1180.

(*d*) Roberts *v.* Cook, 4 Mod. 379.

(*e*) Thrustout d. Williams *v.* Holdfast, 6 T. R. 223.

(*g*) Doe d. Langdon *v.* Langdon, 5 B. & Ad. 864.

(*h*) Dence *v.* Doble, Comb. 110; Keene d. Angel *v.* Angel, 2 T. R. 740; Anon., Salk. 255.

(*i*) Smith d. Ginger *v.* Barnardiston, Blk. 904; *ante*, 230.

King's Bench and the House of Lords, and after the death of the husband, the wife brought a second ejectment on her own demise; the court would not suffer her to proceed until the costs of the first ejectment were paid, saying, "We are not going to compel the lessor to pay the costs, but only to prevent her being vexatious."(*a*) But where, in the first action, the defendant had obtained judgment as in case of a non-suit (the lessor of the plaintiff having withdrawn his record after a peremptory undertaking) and the defendant in the second action (being the heir of the defendant in the first) was not entitled to the costs of that action, the court refused to stay the proceedings until such costs were paid, on the ground that the merits not having been tried, and the defendant having no interest in the costs, he could not complain of vexation, nor bring himself within the principle of the adjudged cases.(*b*)

In a case, in which claimants under very peculiar circumstances had brought three actions, in three different terms, in the court of King's Bench, for the same property, and all three were pending together, and the parties had not proceeded to trial in either, but several orders had been made in the first cause, and the defendants had obtained a rule calling upon the plaintiff to show cause why they should not elect to proceed in one action only, and in case they should elect to proceed in either of the two last actions, why the first action should not be discontinued, and the costs paid by the claimants; and thereupon an improvident rule was agreed to, by which the proceedings in the two last actions were stayed, and the claimants were to proceed to trial in the first action under great disadvantages as to costs, and instead of proceeding with that action, they brought a new ejectment in the court of Common Pleas, that court upon motion stayed the proceedings therein.(*c*)

Where the claimant obtained possession of the disputed premises, as upon a vacant possession, after having brought several unsuccessful actions, the court set aside the judgment and execution, and directed proceedings to be stayed until security should be given for costs.(*d*)

(*a*) Doe d. Hamilton *v.* Hatherly, Stran. 1152.
(*b*) Doe d. Blackburn *v.* Standish, 2 Dow. N. S. 26.
(*c*) Doe d. Carthew *v.* Brenton, 6 Bing. 469.
(*d*) Harvey d. Beal *v.* Baker, 2 Dow. N. S. 75.

It was once holden, that the proceedings in a *second eject- [*359]
ment ought not, *in any case*, to be stayed for non-payment of the costs in the first action, if costs were not, of right, payable to the party applying;(*a*) and that it was, *in all cases*, necessary to show that the party against whom the application was made, had acted vexatiously, or oppressively, before the rule could be obtained. But these maxims have long given place to more just and equitable principles.(*b*)

The court has also ordered the proceedings in a second ejectment to be stayed until the costs of an action for mesne profits, (upon which the lessor in the second ejectment, who had been the defendant in the first, had brought a writ of *error,) as well as the costs of the first ejectment, were paid.(*c*) But the court will not extend the rule to include the damages recovered in such action for the mesne profits, however vexatious the proceedings of the party may have been.(*d*)

The courts will not stay the proceedings in the second action, where the party, against whom the application is made, is already in custody, under an attachment for non-payment of the costs of the first action,(*d*) nor will they include the taxed costs of a suit in equity, brought by the same party for the same property in *the rule;(*e*) nor [*360]
will they stay the proceedings, if it clearly appear that the verdict in the first action was obtained by fraud and perjury;(*g*) nor will they, in any case in which they stay the proceedings, further interfere, so as to compel the claimant to pay the costs by a particular day, or permit the defendant to *non-pros* the action.(*h*)

It is sufficient for the lessor to swear generally, in answer to an application of this nature, that his claim is not founded on the same title as was previously litigated, without disclosing the particulars of the title under which he does claim.(*i*)

There is no particular stage of the proceedings in which it is necessary to move for this rule. It will be granted even before the defend-

(*a*) Thrustout d. Parke *v.* Troublesome, Stran. 1099; S. C., And. 297.
(*b*) Short *v.* King, Stran. 681.
(*c*) Doe d. Pinckard *v.* Roe, 4 East, 585.
(*d*) Doe d. Church *v.* Barclay, 15 East, 833.
(*e*) Doe d. Williams *v.* Winch, 3 B. & A. 602.
(*g*) Doe d. Rees *v.* Thomas, 2 B. & C. 622.
(*h*) Doe d. Sutton *v.* Ridgway, 5 B. & A. 523.
(*i*) Doe d. Bailey *v.* Bennett, 9 Dow. P. C. 1012.

ant has appeared; and it always should be moved for as early in the action as it conveniently can be.(*a*) Where, however, satisfactory reasons were given why the application was not made at an earlier stage, the court stayed *the proceedings after notice of trial, and the lessor had been at the expense of bringing his witnesses to the place of trial.(*b*) The reasons assigned were, that the cause was so clear at the last trial, and the parties had delayed so long commencing their second action, (four years,) that the defendants did not think them in earnest until notice of trial was given, and that the defendant then proceeded to tax his costs, in order to ground the application, which otherwise he would not have done, the lessor of the plaintiff being insolvent.

[*361] *The courts will also stay proceedings when the lessor has two actions depending, at the same time, for the same premises, in the same or different courts,[1] and the proceedings in the one action will then be stayed, until the other action is determined.(*c*) And, in a case where the claimant brought thirty-seven separate ejectments for thirty-seven different houses, all of which depended on the same title, the court said it was a scandalous proceeding, stayed the proceedings in thirty-six of them, and made a rule that they should abide the event of the thirty-seventh.(*d*)

When the party, against whom a verdict in ejectment has been obtained, brings a writ of error, and, pending that writ, commences a second ejectment, the court will order the proceedings in the second action to be stayed until the writ of error is determined; and it seems, also, that if it do not appear to the court, that the writ of error was brought with some other view than to keep off the payment of costs, proceedings will be stayed until the costs of the first action are paid, notwithstanding such costs are suspended by the writ of error.(*e*)

(*a*) Doe d. Mudd *v.* Roe, 8 Dow. P. C. 444.

(*b*) Doe *v* Law, Blk. 1158.

(*c*) Thrustout d. Park *v.* Troublesome, And. 297; S. C., Stran. 1099; Doe d. Carthew *v.* Brenton, 6 Bing. 469.

(*d*) 2 Sell. Prac. 144; ante, 264.

(*e*) Fenwick *v.* Grosvenor, 1 Salk. 228; Grumble *v.* Bodily, Stran. 554.

[1] The court will not stay the proceedings in an ejectment, until the taxed costs of a suit in equity, brought by the same party for the recovery of the same premises, are paid. Doe ex dem. Williams v. Winch et al., 3 Barn. & Ald. Rep. 602.

*By the statute 7 Geo. II., ch. 20, sec. 1, it is enacted, "that when an ejectment is brought by a mortgagee, his heirs, &c., for the recovery of the possession of the *mortgaged premises, and [*362] no suit is depending in any court of equity, for the foreclosing or redeeming of such mortgaged premises, if the person having a right to redeem, having been made the defendant in the action, shall, at any time pending the suit, pay to the mortgagee, or, in case of his refusal, bring into court, all the principal moneys, and interest due on the mortgage, and also costs to be computed by the court, or proper officer appointed for that purpose; the same shall be deemed and taken to be a full satisfaction and discharge of the mortgage, and the court shall discharge the mortgagor of and from the same accordingly." By the third section, the act is not to extend to any case where the person, against whom the redemption is prayed, shall insist either that the party praying redemption has not a right to redeem, or that the premises are chargeable with other sums than what appear on the face of the mortgage, or are admitted by the other side, nor to any case where the right of redemption in any cause or suit shall be controverted or questioned by or between different defendants in the same cause or suit.

An application for a rule to stay proceedings under this statute,(*a*) must of course be made before execution executed, and must be accompanied by an affidavit that no suit in equity is depending. The party must also appear to the action before the application is made, for, the courts have no power to interfere, under the statute, until after appearance;(*b*) and this fact must appear in the affidavit, but it is sufficient to swear that the party "has entered the usual appearance," without proceeding to state that he has entered into the consent rule.(*c*)

†In a case where *the premises were in possession of a ten- [*363] ant of the mortgagor, who neglected to appear, in consequence of which the mortgagee recovered possession under a judgment by default, the court would have set the judgment and execution aside, in order to let the mortgagor in as defendant, and so place him in a condition to apply for a stay of proceedings, if the mortgagee had not consented to take what was due upon the mortgage, and restore possession.(*d*)

(*a*) Append. No. 46.
(*b*) Doe d. Hurst *v.* Clifton, 4 Ad. & Ell. 814.
(*c*) Doe d. Coxe *v.* Brown, 6 Dow. P. C. 471.
(*d*) Doe d. Tubb *v.* Roe, 4 Taunt. 887.

In a case where a mortgagee left his property to executors, and his will was disputed, but by the sentence of the Prerogative Court established, and letters testamentary granted; after which grant the heir appealed to the Court of Delegates, pending which appeal the executors assigned the mortgage to the lessor, who also, pending the appeal, brought an ejectment against the mortgagor, to which ejectment the mortgagor did not appear, but suffered judgment to go by default against the casual ejector. Upon an application by the mortgagor to stay execution until the determination of the appeal, upon the ground that the title of the lessor would be invalidated, provided the appeal were given in favor of the heir, and that the defendant might [*364] *then, perhaps, be compelled to pay the mortgage-money twice, the court ordered the execution to be stayed until the appeal should be determined, upon the defendant vesting the mortgage-money, interest, and costs, in exchequer bills, and depositing them with the signer of writs."(*a*)

A rule upon this statute has been granted after an agreement, on the part of the mortgagor, to convey the equity of redemption to the mortgagee, where no tender of a deed of *conveyance for execution had been made to the defendant, or bill in equity filed;(*b*) but where it appeared that, subsequently to the defendant's agreement, several applications had been made to him, but without effect, to complete the purchase, the court refused to stay the proceedings.(*c*)

In a case where, upon an application by the mortgagor to stay proceedings under this statute, it appeared that he had also taken up money from the mortgagee upon his bond, the court granted a rule upon the payment of the mortgage and interest only, the bond debt not being a lien upon the lands; but it seems that when in such case *the* [*365] *heir* is bound by the *bond, and the mortgagor dies, the heir must discharge the bond debt, as well as the mortgage.(*d*) Where, however, the bond was *a lien on the estate*, and the mortgagee had given notice to the mortgagor, that he should insist upon payment

(*a*) Doe d. Mayhew *v.* Erlam, MS., M. T. 1811. The court did not in this case advert to the circumstances that the mortgagor, who made the application, had not appeared to the action; *vide*, Doe d. Hurst *v* Clifton, 4 Ad. & Ell. 814.

(*b*) Shinner *v.* Stacey, 1 Wils. 80.

(*c*) Goodtitle d. Taysum *v.* Pope, 7 T. R. 185.

(*d*) Bingham d. Lane *v.* Gregg, Barn. 182; Archer d. Hankey *v.* Snapp, And. 341; S. C., Stran. 1107, *and the cases there cited.*

of the money due upon it, the court refused to stay the proceedings, upon payment of the mortgage-money only.(*a*) Where also, other mortgages, although upon different premises, existed between the defendant and the claimant, the court would not stay proceedings under this statute, upon the payment of the sum due upon one of the mortgages only.(*b*)

If upon a motion of this nature, any doubt exist as to the amount due, the courts will refer the case to the proper officer: and in a case where an affidavit was made, that the mortgagee had been at great expense in necessary repairs of part of the premises (the ejectment being brought for the residue, *and it was prayed that the officer might be directed to make allowance for such repairs; the court said, that the rule must follow the words of the statute, and that the officer would make just allowances and *deductions.(*c*) If, however, [*366] after taxation, the debt and costs are not paid, the lessor must proceed in the suit, and cannot have an attachment.(*d*)

Upon staying proceedings under this statute, the costs are to be taxed in the ordinary way, and not as between attorney and client.(*e*)

The cases in which the courts have stayed the proceedings, under stat 4 Geo. II. c. 28, have already been considered.(*g*)

The court would not stay proceedings in an action brought by the provisional assignee of the Insolvent Debtors' Court, on an objection that it was not proved at the trial of the cause that the assignee had, pursuant to stat. 1 Geo. IV. c. 119, s. 11, the authority of the Insolvent Debtors' Court to proceed.(*h*)

(*a*) Felton *v.* Ash, Barn. 177.

(*b*) Roe d. Kaye *v.* Soley, Blk. 726. It does not appear from the report of this case, that the other mortgaged premises were included in the ejectment; but it is difficult to reconcile the decision either to the letter or spirit of the statute, unless they were also contained in the declaration.

(*c*) Goodright *v.* Moore, Barn. 176.

(*d*) Hand *v.* Dinely, Stran. 1220.

(*e*) Doe d. Capps *v.* Capps, 3 Bing. N. C., 768.

(*g*) Ante, 120, &c.; Append. No. 47.

(*h*) Doe d. Spencer *v.* Clarke, 3 Bing. 370.

*CHAPTER XII.

Of the Statutes 1 *Geo. IV. c.* 87, *and* 1 *Wm. IV. c.* 70.

The protracted period during which dishonest or insolvent tenants are enabled, by the ordinary course of law, to retain possession of their farms after the determination of their interest, has long been productive of serious evils to landlords. Unless a tenancy expires at Christmas, upwards of six months must, and frequently eight or nine months will, elapse, before final judgment and execution can be obtained; during which period the tenant has the uncontrolled power of suffering the land to remain uncultivated, or of committing wilful destruction, as temper or immediate interests may prompt. The provisions of the stat. 4 Geo. II. c. 28, giving double the yearly value of the lands held over, affords no efficient relief in cases of this description. These frauds are not committed by respectable or responsible tenants; and when the tenant is insolvent or dishonest, the judgment of the Insolvent Debtors' Court gives but an unsubstantial remedy for the injury which the landlord has sustained.

To mitigate these evils, the beneficial statutes now under consideration have been passed, and the general effect of them is as follows:—They enable the landlord, when the tenant *holds under an agreement in writing*, to compel him before he is admitted to defend, to give security for the damages and costs of the action, and that he will relinquish possession within four days after the trial, unless he shall, within that time, give further security that he will not commit waste, or otherwise injure the land, before the ordinary time of obtaining judgment or execution. And they also enable the landlord in all †cases, *whether the holding has been in writing or by parol*, to bring his cause to trial at the assizes next following the expiration of the tenancy, unfettered by the machinery of terms and returns; as likewise to recover the mesne profits as well as the land itself in the ejectment, and to obtain possession immediately after the trial, if the judge shall certify his opinion on the record that he ought to do so.

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STAT. 4 GEO. IV. c. 87.

This statute, after reciting the losses to which landlords were exposed by the law as it then stood, enacts, that where the term or interest of any tenant, holding *under a lease or agreement in writing* has expired or been determined, and such tenant, or any one claiming under him, shall refuse to deliver up possession, after demand in writing signed by the landlord or his agent, and served personally upon him, or left at his usual place of abode, and the landlord shall thereupon bring an ejectment, such landlord may, at the foot of the declaration, address a notice to the tenant, requiring him to appear on the first day of the following term, to be made defendant, and to find such bail as may be ordered by the court under the provisions of the statute; and upon his appearance, or in case of non-appearance, on the usual affidavit of service, and the production of the lease or agreement, or some counterpart or duplicate, and proof of its execution by affidavit, and also upon affidavit that the premises have been actually enjoyed under the lease or agreement, and that the interest of the tenant has ceased, and that possession has been lawfully demanded, the landlord may move the court for a rule to show cause why the tenant, upon being admitted defendant, besides entering into the common rule, and giving the common undertaking, shall not undertake, in case a verdict pass for the plaintiff, to give him judgment of the term next preceding the time of trial, and also enter into a recognizance, with two sufficient sureties, in a reasonable sum, to pay costs and damages; and in case *the party shall neglect or refuse to perform such conditions as shall be ordered by the court upon showing cause against this rule, or on an affidavit of service of such order, when no cause is shown, an absolute rule shall be made for entering up judgment for the plaintiff.

By section 2, it is further enacted, that whenever it shall appear on the trial of any ejectment between landlord and tenant, that the tenant hath been served with due notice of trial, "the production of the consent rule shall be sufficient evidence of lease, entry, and ouster; and the judge before whom such cause shall come on to be tried, whether the defendant shall appear upon such trial or not, shall permit the plaintiff, after proof of his right to recover possession of the premises, to go into evidence of the mesne profits accruing from the determination of the tenant's interest, down to the time of the verdict, or to some preceding day to be specially mentioned therein; and the jury, find-

ing for the plaintiff, are to give their verdict upon the whole matter, both as to the recovery of the premises, and also as to the amount of the damages to be paid for mesne profits; but the above proceedings are not to bar the landlord from proceeding by action of trespass for the recovery of the mesne profits accruing from the verdict, or the day so specified therein, down to the day of obtaining possession."

By the 3rd section, the judge is empowered, in case it shall appear to him "that the finding of the jury was contrary to the evidence, or that the damages given were excessive, to order the execution to be stayed absolutely till the fifth day of the next term, and is in all cases compelled to make such order upon the requisition of the defendant, in case he shall forthwith undertake to find, and within four days from the day of the trial, shall actually find two sufficient sureties, in such sum as the judge shall direct, not to commit waste, or other wilful damage, and not to sell or carry off any standing crops, hay, &c., *from the day of the verdict to the day of execution; but such recognizance to stand discharged in case a writ of error shall be brought, and security given under statute 16 & 17 Car. II., and (as regards Ireland) statute 17 & 18 Car. II."

The 4th section provides, "that the recognizances and securities shall be taken in the same manner, and by the same persons as recognizances of bail; that a fee of two shillings and sixpence only shall be paid for filing them, and that no proceeding shall be taken upon them after the expiration of six months from the time when the landlord shall have obtained actual possession of the premises."

The 6th section relates only to the Welsh jurisdiction, now abolished;(*a*) and by the 7th, 8th, and 9th sections, Scotland is exempted from the operation of the act, all other remedies of landlords are retained, and double costs are given to the defendant if he obtain a verdict, or the plaintiff be non-suited on the merits.

This statute is only applicable to cases in which the relationship of landlord and tenant is clear, and its provisions will not be enforced if there is any dispute as to the title; as, for example, where the tenant

(*a*) Stat. 1 Wm. IV. c. 70.

made affidavit that he claimed to hold as heir-at-law.(*a*) With respect to leases also, it only applies to cases where the lease or term has expired by efflux of time, and not to tenancies determined by a surrender by the tenant of his term,(*b*) or by a notice either from or to the landlord, where there is a subsisting lease for a term of years, determinable at the end of a certain number of them, and so determined by a notice under the lease.(*c*)

A tenancy by virtue of an agreement in writing for *three *months certain*, is a tenancy within the meaning of this statute, because it is a tenancy "for a term certain;"(*d*) but a tenancy for years *determinable on lives* is not, because it is not a holding for "a number of years certain."(*e*) So, likewise, a holding from year to year, under a written agreement, is within the statute, although a holding by parol from year to year is not: the words *in writing* extending to the whole sentence, and not being confined to holdings for a term, or number of years certain.(*g*)

The notice at the foot of the declaration, required by this statute, should be signed by the landlord, or his attorney, or agent,(*h*) and should be in addition to, and not form part of, the ordinary notice signed by the casual ejector.(*i*) It must require the tenant, in the terms of the statute, to appear in court "on the first day of the term" next following, and a notice "to appear according to the statute in the next following term," will not be sufficient.(*k*) But it need not specify in detail the purposes for which it is given. A notice calling upon the tenant to appear, &c., "and to find such bail, if ordered by the court, and for such purposes as are specified by the statute," will suffice,(*h*) and the court will mould the rule conformably to the statute on showing cause.(*l*)

(*a*) Doe d. Sanders *v.* Roe, 1 Dow. P. C. 4.
(*b*) Doe d. Tindal *v.* Roe, 2 B. & Ad. 922.
(*c*) Doe d. Lord Cardigan *v.* Roe, K. B. T. T. 3 Geo. 4, MS.; S. C., 1 D. & R. 540.
(*d*) Doe d. Phillips *v.* Roe, 5 B. & A. 766.
(*e*) Doe d. Pemberton *v.* Roe, 7 B. & C. 2.
(*g*) Doe d. Earl of Bradford *v.* Roe, 5 B. & A. 770.
(*h*) Doe d. Beard *v.* Roe, 1 M. & W. 360; but an affidavit verifying the agency is not necessary; Doe d. Gildart *v.* Roe, 1 W. W. & H. 346.
(*i*) Anon., 1 D. & R. 435; Doe d. Sampson *v.* Roe, 6 B. Moore, 54.
(*k*) Doe d. Holder *v.* Rushworth, 4 M. & W. 75.
(*l*) Doe d. Phillips *v.* Roe, 5 B. & A. 766.

It should form part of the rule that the landlord shall be at liberty to sign judgment against the casual ejector in case of default on the part of the tenant to give the required securities.(*a*)

The affidavit in support of the application must have the *names of the plaintiff's lessor set out at full length; and if there be more than one lessor, the Christian and surnames of all the lessors must be set forth;(*b*) but if the objection be not taken at the time, the court will not, in a subsequent stage of the cause, set aside the proceedings for irregularity.(*c*)

It must also contain a positive averment of the execution of the lease or agreement by the tenant,(*d*) and that the tenancy has either expired by efflux of time, or been determined by a regular notice to quit.(*e*)

The original lease or agreement, or a counterpart or duplicate, must be produced, when the rule *nisi* is moved for, and such instrument must be at that time stamped. It is not sufficient to move on a copy of the instrument, or on an instrument stamped after the rule *nisi* and before cause shown.(*g*)

The execution of the instrument by the defendant must also be proved, but the affidavit of the subscribing witness is not necessary. It may be proved *aliunde*,(*h*) by any person present at the execution, or acquainted with the handwriting. And, although in a case in the Court of Queen's Bench (*coram* Williams, J.,) an attorney who was a subscribing witness, and had subsequently become the attorney for the defendant, was compelled to make the affidavit, and to pay the costs of the application, the rule seems, from the report, to have been granted rather on the ground that the refusal of the attorney to make the affidavit was reprehensible, and a contempt of court, than upon any real necessity for his testimony.(*i*)

(*a*) Doe *v.* Roe, 2 Dow. P. C. 180.
(*b*) Doe d. Watson *v.* Roe, 5 Dow. P. C. 389.
(*c*) Doe d. Anglesey *v.* Brown, 3 Dow. P. C. 230.
(*d*) Doe d. Beard *v.* Roe, 2 Gale, 131.
(*e*) Doe d. Topping *v.* Boast, 7 Dow. P. C. 487.
(*g*) Doe d. Caulfield *v.* Roe, 3 Bing. N. C. 329.
(*h*) Doe d. Gowland *v.* Roe, 6 Dow. P. C. 35; Doe d. Morgan *v.* Rotherham, 3 Dow. P. C. 690.
(*i*) Doe d. Avery *v.* Roe, 6 Dow. P. C. 518.

*A demand of possession is sufficient notice to entitle the plaintiff to the benefit of the statute;(a) and, in a case where the tenant had absconded to America, a rule *nisi* was granted (service of the demand of possession on the premises to be deemed good service,) in order to give the landlord the benefit of the statute.(b)

The time within which the required bonds and security shall be given, is to be fixed by the court at the time the rule is granted.(c)

The court will only direct recognizances to be entered into under this statute, on the appearance of the defendant, for the costs of the action, and not for the mesne profits.(d) And, in entitling the recognizance, the name of the tenant should be substituted for the nominal defendant;(e) these recognizances, also, do not supersede the necessity of the two sureties required by stat. 16 & 17 Car. II., ch. 8, in case the defendant should bring a writ of error.(g)

If the tenant relies, in answer to the application, upon a subsequent retaking of the premises, such retaking must be alleged with particularity and precision; and when it was shown by the tenant, that, after the expiration of the tenancy, he retook the premises by parol, and that he rented and held them under such parol agreement at that time, and that he was advised there was a valid tenancy then existing, and that he had a good defence to the action, the Court of Common Pleas, notwithstanding, made the rule absolute, because the affidavit only deposed that he retook the premises, without †stating for what period, or on what terms; and, therefore, that, in the absence of satisfactory evidence of a new taking, the case was within the act.(h)

It is not necessary for the lessor of the plaintiff to prove the due service of notice of trial, in order to enable him to proceed for the mesne profits under this statute, in case the defendant does not appear, the court of Queen's Bench being of opinion that the word "such" in the second clause, confines the enactment to "ejectments at the suit of

(a) Doe d. Anglesey *v.* Roe, 2 D. & R. 565.
(b) Doe d. Selgood *v.* Roe, 1 W. W. & H. 206.
(c) Doe d. Anglesey *v.* Brown, 2 D. & R. 688.
(d) Doe d. Sampson *v.* Roe, 6 B. Moore, 54.
(e) Roe d. Durant *v.* Moore, 6 Bing. 656.
(g) Roe d. Durant *v.* Moore, 7 Bing. 124.
(h) Roe d. Durant *v.* Moore, 6 Bing. 574.

a landlord against a tenant," but does not limit it to cases where notice of trial is proved.(*a*)

STAT. 1 WM. IV. C. 70.

The 36th section of this statute, after reciting the delays suffered by landlords in recovering possession of their lands, enacts "that in all actions of ejectment where the tenancy shall expire, or the right of entry accrue to the landlord, in or after *Hilary* or *Trinity* terms respectively, he may within ten days after the tenancy shall have expired, or right of entry accrued,(*b*) serve a declaration in ejectment, entitled of the day next after the day of the demise in the declaration, whether the same shall be in term or in vacation,(*c*) with a notice subscribed, requiring the tenants in possession to appear and plead, within ten days;(*d*) and that proceedings are to be had on such declaration, and rules to plead entered and given, in the same manner, as nearly as may be, as if the declaration had been duly served before the preceding term; and it then provides that judgment shall not be signed against the casual ejector until default of appearance and plea within the ten days, that there shall be given at least six clear days' notice of *trial before the commission day of the assizes at which such ejectment is intended to be tried, and that the defendant may apply in the ordinary manner to a judge in chambers for time to plead, or for staying or setting aside the proceedings, or for postponing the trial.

Section 37 enacts, "that in making up the record the declaration may be specially entitled of the day next after the day of the demise therein, whether such day shall be in term or in vacation, and no judgment shall be avoided or reversed by reason only of such special title."(*e*)

Section 38 empowers the judge, before whom the cause shall be tried, to certify his opinion on the back of the record, that a writ of possession ought to issue immediately, and that upon such certificate a writ of possession may be issued forthwith,(*g*) and the costs taxed, and

(*a*) Doe d. Thompson *v.* Hodgson, 1 Q. B. Rep. 135.
(*b*) Ante, 208.
(*c*) Ante, 164.
(*d*) Ante, 184, 209.
(*e*) Ante, 207.
(*g*) Appendix, No. 37.

judgment signed and executed afterwards at the usual time, as if no such writ had issued; and the section contains a further provision that the writ, instead of reciting a recovery by judgment, shall recite shortly that the cause came on for trial at *nisi prius* at such a time and place and before such a judge, (naming the time, place, and judge,) and that thereupon the said judge certified his opinion that a writ of possession ought to issue immediately.

The word "assizes" in the 36th section has been construed not to extend to "sittings at *nisi prius*," and consequently the statute does not extend to cases in London and Middlesex.(*a*) It is also, with respect to country causes, limited to cases in which the right of entry has accrued during Hilary or Trinity terms, or the vacations following them.(*b*)

*An objection that the action was not commenced within ten days after the right of entry accrued, is matter of irregularity, and cannot be taken at *nisi prius*;(*c*) and it is no ground for setting aside a verdict, that the plaintiff did not give six clear days' notice of trial, if the defendant appears and makes his defence.(*d*)

Where a lease contained a proviso for re-entry, in case of non-repair within three months after notice, and the landlord gave notice, and brought ejectment and proceeded to trial *before* the expiration of the three months, and at the trial an order of court was made with consent of parties, that a juror should be withdrawn, and the premises repaired by the 24th of June then next, and default being made, the landlord brought a second ejectment on June 28th, under this statute; it was held that the ejectment was properly so brought, for that the right of entry was suspended by virtue of the arrangement until the time for completing the repairs had passed by.(*e*)

The provisions of the 38th section are not limited to ejectments between landlords and tenants, but extend to all ejectments; and the judge has no other discretion given him by that section, than that of granting a certificate for *immediate* possession, or refusing the certificate

(*a*) Doe d. Norris *v.* Roe, 1 Dow. P. C. 547.
(*b*) Doe *v.* Roe, 1 Dow. P. C. 79, 304; Doe d. Somerville *v.* Roe, 4 Moore & S. 747.
(*c*) Doe d. Rankin *v.* Brindley, 4 B. & Ad. 84.
(*d*) Doe d. Antrobus *v.* Jepson, 3 B. & A. 402.

altogether.(*a*) In the case of *Doe d. Parker* v. *Hilliard*, Park, J., granted the certificate in the usual form, upon the lessor's undertaking not to put the writ of possession in force, if the arrears of the annuity (which were the foundation of the action) were paid within a month.(*b*)

Where the plaintiff is non-suited for want of the appearance *of the defendant, it is of course requisite that an affidavit of the circumstances should be laid before the judge before he will grant the certificate.(*c*)

Where an ejectment was brought on two demises, and a verdict was taken for the plaintiff on the first demise, with liberty for him to move to enter a verdict for him on the second demise, he is not precluded from doing so, by having obtained early execution on the verdict on the first demise, and possession being taken under it.(*d*)

(*a*) Doe d. Williamson *v.* Dawson, 4 C. & P. 589.
(*b*) 5 C. & P. 132.
(*c*) Doe d. Williamson *v.* Dawson, 4 C. & P. 589.
(*d*) Doe d. Gov. & Comp. of the Bank of England *v.* Chambers, 4 Ad. & Ell. 410.

*CHAPTER XIII.

Of the Action for Mesne Profits.[1]

On the first introduction of the action of ejectment, and whilst the ancient practice prevailed, the measure of the damages were the profits

[1] See Benson v. Matsdorf, 2 Johns. 369; Murphy v. Guion, 2 Hayw. 145; Den v. Chubb, Coxe, 466; Boyd v. Cowan, 4 Dall. 138; Burton v. Austin, 4 Verm. 105; Battin v. Bigelow, Pet. C. C. Rep. 452.

The statute of New York, abolishing the action of mesne profits, and substituting a suggestion upon the record, applies only to mesne profits strictly, the right to which results from the recovery in ejectment. The original entry is still the subject of an action for trespass; and so are mesne profits where the plaintiff obtains possession without suit, or without prosecuting suit to judgment; nor does the statute apply where the claim for mesne profits is not solely against the person who was defendant in ejectment, but is against him and others jointly; in such case trespass for mesne profits may be maintained, even though it appear that the plaintiff before the ouster complained of had entered into an executory contract for the sale of the premises, and that his vendee was in possession at the time of the ouster. Leland v. Tousey, 6 Hill, 328. But see Cummings v. M'Gehee, 9 Porter, 349.

Since, as well as before the Revised Statutes, a plaintiff in ejectment is entitled to recover mesne profits only for the period of six years, and is now limited to that period, although the statute of limitations be not pleaded. Jackson v. Wood, 24 Wen. 443.

Where a defendant in ejectment moves for a new trial under the statute, the court cannot require as a condition that he shall pay the costs of a suggestion for mesne profits, nor can they impose any terms beyond the payment of costs of the principal suit. Shaw and wife v. MacMaren, 2 Hill, 417.

In an action for mesne profits the record of the plaintiff's recovery in ejectment is not conclusive evidence of his title as against strangers to the record, but only as against parties and privies. Leland v. Tousey, 6 Hill, 328.

In ascertaining the mesne profits or rents of premises in the city of New York, interest may be computed upon the rents from the expiration of the quarter days, instead of the expiration of the year. Jackson v. Wood, 24 Wen. 443.

A recovery of nominal damages in ejectment is no bar to an action for the mesne profits. Van Alen v. Rogers, 1 Johns. Cas. 281.

And it is unnecessary to enter a *remittitur damna*. Ib.

A recovery in an action of trespass on land, is a bar to an action for the recovery of mesne profits anterior to the verdict in trespass. Coleman v. Parish, 1 M'Cord's Rep. 264

Where the title of the lessor, being a life estate, ends before the trial of the cause, the plaintiff, though he cannot turn the defendant out of possession, is entitled to judgmment, so as to enable him to recover the mesne profits, but with a perpetual stay of the writ of possession. Jackson ex dem. Henderson v. Davenport, 18 Johns. Rep. 295.

of the land accruing during the *tortious* holding of the defendant; but when the proceedings became fictitious, and the plaintiff nominal, the damages assessed became nominal also; and no provisions have since been made by the courts, either by engrafting additional conditions upon the consent rule,(*a*) or by the invention of new fictions, to enable the jury in the action of ejectment to inquire into the actual damages, and include in their verdict the real injury sustained by the

(*a*) Ante, 223.

After the re-entry of the disseisee, the law supposes the freehold all along to have continued in him; and he may maintain trespass against the disseisor and his servants. Dewey v. Osborn, 4 Cow. Rep. 329. An action for mesne profits is the proper remedy where crops have been seised before the writ of possession was executed. Brothers v. Hurdle, 10 Iredell, 490.

In ejectment in Pennsylvania, the mesne profits may be recovered, and down to the time of the verdict, the plaintiff may go for the possession and profits together. Dawson v. McGill, 4 Wharton's Rep. 230.

Though a recovery for mesne profits cannot be had till possession is recovered, yet a possession gained by the owner's entry is sufficient without the necessity of an ejectment. Reed v. Stanley, 6 Watts & Serg. Rep. 369.

A plaintiff in ejectment will not be permitted to recover the mesne profits in the same action, unless he give previous notice of such claim. Cook v. Nicholas, 2 Watts & Serg. Rep. 27.

In an action of trespass to recover mesne profits, after a recovery of the land by ejectment; if the plaintiff give evidence of profits received by the defendant anterior to the time of the issuing of the writ of ejectment, then the verdict and judgment in that action are not conclusive, and the defendant may give evidence to show that the title was then in him.

In such action the plaintiff may recover more than the rent or yearly value of the land: he may charge all actual damage and injury to the premises. Huston v. Wickersham, 2 Watts & Serg. Rep. 308.

If a vendor of land or real estate, after having put the vendee in possession agreeably to the terms of sale, and received part of the purchase money, take possession of it again and use it, without the consent of the vendee or his heirs, he or his assignee to whom he has sold the land a second time, is chargeable in an action of ejectment brought against either by the first vendee or his heirs, with the rents, issues and profits, as long as he holds and uses the same, to be applied to satisfy any balance that may be due and unpaid, of the purchase money at the time of re-taking the possession so far as the profits may be requisite for that purpose, when sufficient, to answer it.

If the regaining the possession by the vendor in such case, be effected by means of collusion with the tenant of the first vendee or his heirs, it is not necessary that a tender of the residue of the purchase money should be made by the latter before instituting an action of ejectment to recover the possession.

The defendant in the ejectment in either case, will not be permitted to give evidence of the value of the improvements made by him on the land, which were not necessary for the profitable enjoyment of it. Wykoff v. Wykoff, 3 Watts & Serg. Rep. 481.

wrongful holding.[1] The party has not, however, been left without redress; and the remedy provided is far more comprehensive and efficacious in its nature than could have been obtained by any adaptation to this object of the action of ejectment itself. The courts have sanctioned an application of the common action of trespass *vi et armis* to the purposes of this remedy.[2] It is generally termed *an action for*

[1] After judgment for the plaintiff in ejectment, trespass for the mesne profits, without proof of an actual trespass, does not lie against a person who was no party to the suit when the judgment was entered. Alexander v. Herbert, 2 Call's Rep. 508.

[2] An action of trespass is a proper mode of recovering mesne profits after a recovery in ejectment, under the acts of 21st March, 1806, and 13th April, 1807, [Pennsylvania.] Osbourn v. Osbourn, 11 Serg. & R. Rep. 55.

There is nothing in the action of ejectment by writ under these acts of assembly, which varies the consequence of a recovery from those of the common law, except where expressly declared by the legislature. Ib.; see Poindexter v. Cherry, 4 Yerger, 305.

It seems, that if the plaintiff do not seek to recover damages for a time anterior to the service of the writ of ejectment, the recovery in ejectment is conclusive, and estops the defendant; but if he do, he must show his title, and the possession of the defendant. Ib.

He must show title both when his action is commenced and when tried. Burton v. Austin, 4 Verm. Rep. 105.

In Alabama, the action of trespass to try titles has been substituted for the actions of ejectment and trespass for mesne profits, and performs the office of both; and, as in the action for mesne profits, the plaintiff is entitled to recover the damages he has sustained by being kept out of possession; and these are never increased or diminished by the profits acquired by the defendant from his occupancy. Bullock v. Wilson, 3 Porter's Rep. 382.

In ejectment, there can be no recovery for rents and profits accruing subsequently to the commencement of the action. Starr v. Pease, 8 Conn. Rep. 541.

Trespass for mesne profits is not maintainable after recovery of possession in ejectment or trespass, to try title in Alabama; but damages may be recovered for the period between recovery of judgment and execution of the writ of *habere facias*. Cummings v. M'Gehee, 9 Porter's Rep. 349.

Damages, as a compensation for rents and profits, in an action of trespass to try title, in Alabama, can only be computed from the time when the title was *cast* upon the plaintiff. Brewster v. Buckholts, 2 Ala. Rep. 20.

If defendant would end suit and prevent recovery of damages for a longer period of occupancy, he should make disclaimer in open court, or in some other manner, and yield possession to the plaintiff. Bumpass v. Webb, 2 Ala. Rep. 109.

The damages in trespass to try title cannot be lessened by evidence that the plaintiff paid an inadequate price for the land. Love et al. v. Powel, 5 Ala. Rep. 58.

Where mortgagee brings writ of entry against mortgagor without *declaring upon the mortgage*, and recovers a judgment at common law by which he enters upon the mortgagor, the mortgagor is not liable in trespass for mesne profits. So where the grantee of an equity of redemption conveyed the same to a stranger, but still remained in possession; and mortgagee brought a writ of entry against him, not declaring on the mortgage, and recovered judgment at common law, and entered on the tenant by virtue thereof, but showing no title except under the mortgage; it was held, that tenant was not liable to mortgagee for mesne profits. Boston Bank v. Reed, 8 Pick. Rep. 459.

mesne profits, and the plaintiff complains in it of his ejection and loss of possession, states the time during which the defendant (the [*380] real party) held the land, or *took the rents and profits, and prays judgment for the damages which he has thereby sustained.

This action is partly superseded, when the relation of landlord and tenant has subsisted between the parties to the ejectment, by the provisions of the stat. 1 Geo. IV. c. 87,(*a*) which enables landlords to recover in that action, the mesne profits *accruing from the day of the determination of the tenancy (without reference to the day of the demise in the declaration) to the day of the trial, or some *preceding* day. But this mode of recovering the mesne profits is optional with the landlord: and as an action for mesne profits must notwithstanding be resorted to, for the recovery of those profits from the day of the trial, or other *preceding* day, to the day of obtaining possession, and as it is often difficult for the landlord to ascertain what injury he has actually sustained, by the holding over of the tenant (the amount of the damages not being limited to the amount of the rent) until he obtains actual possession, this provision of the statute is, in practice, seldom resorted to.[1]

It has been said, that a lessor in ejectment may, if he please, waive the trespass, and recover the mesne profits in an action for use and occupation;(*b*) but this election must be limited to the profits accruing antecedently to the time of the demise in the ejectment; for the action for use and occupation is founded on *contract*, the action of [*381] ejectment upon *wrong*, and *they are therefore wholly inconsistent with each other when applied to the same period of time; since in the one action the plaintiff treats the defendant as a *tenant*, and in the other as a *trespasser*.(*c*) When, however, a tenant holds

(*a*) Ante, 280, 322.
(*b*) Goodtitle *v.* North, Doug. 584; Doe d. Cheney *v.* Batten, Cowp. 243.
(*c*) Birch *v.* Wright, 1 T. R. 378.

See Duffield v. Stille, 2 Dall. 156; Fenn v. Stille, 1 Yeates, 154.

In trespass for mesne profits after judgment in ejectment, the defendant, in order to prevent a recovery of profits that accrued before service of the declaration, may prove that he had not occupied the premises before such service. Vance v. Inhabitants of Congressional Township, 7 Blackf. Rep. 241.

[1] See Newport *v.* Walker, 18 Vermont Rep. 600.

over after the expiration of the landlord's notice to quit, the landlord, after a recovery in ejectment, may waive his action for mesne profits, and maintain debt upon the 4 Geo. II. c. 28, against the tenant, for double the yearly value of the premises during the time the tenant so holds over; for the double value is given by way of penalty, and not as rent.(*a*)

*The action for mesne profits may be brought pending a writ of error in ejectment, and the plaintiff may proceed to ascertain his damages, and to sign his judgment;[1] but the court will stay execution until the writ of error is determined.(*b*)

The action is bailable or not, at the discretion of the court, or judge; and when an order for bail is made, the recognizance is usually taken in two years' value of the premises, but this is also discretionary.(*c*)

OF THE PARTIES.

The lessor of the plaintiff in the antecedent action of *ejectment, is of course the person concerned in interest, but he may bring his action for mesne profits either in his own name, or that of his nominal lessee.(*d*) The former, however, is the most advantageous [*382]

(*a*) Timmings *v.* Rowlison, Burr. 1603. It is not yet settled whether, when the ejectment is founded upon a notice to quit given by the tenant, the landlord is entitled to maintain debt upon the 11 Geo. II. c. 19, for double rent, but it seems the better opinion that he is not; ante, 115.

(*b*) Harris *v.* Allen, Cas. Prac. C. P. 46; Donford *v.* Ellis, 12 Mod. 138.

(*c*) Hunt *v.* Hudson, Barn. 85; 1 Sell. Prac. 36.

(*d*) It may here be incidentally observed, that when the ancient practice is resorted to, and the plaintiff in the ejectment is a real person, the court will not permit him to release the action for mense profits, should the lessor bring it in his name. (Close's case, Skin. 247; Anon., Salk. 260.)

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[1] An action for mesne profits will not lie until after a recovery in ejectment; nor will it lie for an injury to the freehold until after such recovery. Morgan v. Varick, 8 Wen. 587; Burton v. Austin, 4 Verm. Rep. 105.

Damages can never be recovered unless the land or some portion of it is recovered. Smith v. Benson, 9 Verm. Rep. 138.

It is not necessary to enter up a formal judgment, in ejectment, to entitle the plaintiff to bring trespass for the mesne profits. Murphy v. Guion's Ex.'rs, 1 Nor. Car. Law Repos. 95.

Where a defendant in ejectment, who has been evicted by *habere facias possessionem*, is afterwards restored to possession by writ of restitution, he is liable to an action of mesne profits, from the original eviction, if the writ of restitution is quashed. Trabue et al. v. Kellar, 3 Marsh. Rep. (Ky.) 518.

method, as he may then, upon proper proofs, recover damages for the rents and profits received by the defendant, anterior to the time of the demise in the ejectment,[1] which cannot be done in an action at the suit of the nominal plaintiff;(*a*) and the courts will not stay the proceedings until security be given for the costs, which will be done when the action for mesne profits is brought in the name of such nominal lessee.(*b*)[2]

It was once, indeed, doubted whether this action could be maintained in the name of the plaintiff in the ejectment, after a judgment by default against the casual ejector, because, *being a possessory action, an entry must be either proved or admitted, neither of which, it was argued, could in such case be done; but it is now settled, that there is no distinction between a judgment in ejectment upon a verdict and one by default,[3] the right of the claimant being in the one case tried and determined, and in the other confessed.(*c*)

(*a*) B. N. P. 87.
(*b*) Say. Costs, 126.
(*c*) Aislin *v.* Parkin, Burr. 665; Jeffries *v.* Byson, Stran. 960.

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[1] The general rule, in trespass for mesne profits is, that the plaintiff shall recover for such time as he can prove the defendant to have been in possession, provided he does not go back beyond six years, in which case, the statute of limitations may be pleaded. Hare v. Furey, 3 Yeates' Rep. 13.

In trespass for mesne profits, after recovery in ejectment, the plaintiff cannot give evidence of the annual value of the premises beyond the time of the lease, mentioned in the declaration in ejectment. Shotwell v. Boehem, 1 Dall. Rep. 172.

[2] Where the action for mesne profits is brought in the name of the nominal plaintiff in ejectment, the court will stay proceedings, on his part, till security for costs be filed. Jackson v. Par, 4 Cow. Rep. 147.

[3] In trespass for mesne profits, consequent on an ejectment, and judgment by default against the casual ejector, the defendant can set up no matter of defence admissible in the original action; *e. g.* that he was not in possession of the premises in question. Jackson v. Combs, 7 Cow. Rep. 36. Same point, Baron v. Abeel, 3 Johns. Rep. 481; Langendyck et ux. v. Burhans, 11 Johns. Rep. 463.

After a recovery in ejectment by default, against the casual ejector, the lessor of the plaintiff may maintain trespass for the mesne profits against the tenant, as well for the use of the land as for the costs of the ejectment. Baron v. Abeel, 3 Johns. Rep. 481.

In an action for mesne profits, the confession of entry by the defendant in the ejectment is sufficient to enable the plaintiff to recover; *aliter*, when the judgment in ejectment was recovered by default. Lessee of Brown v. Galloway, 1 Peters' Circ. Ct. Rep. 291.

A tenant in common, who has recovered in *ejectment, may [*383] maintain an action for mesne profits against his companion.(a)[1]

A joint action for mesne profits, may be supported by several lessors of the plaintiff in ejectment, after a recovery therein, although there were only separate demises by each.(b)[2]

As the action for mesne profits is an action of trespass, it cannot be maintained against executors or administrators, for the profits accruing during the lifetime of the testator or intestate; nor will a court of equity interfere to enforce the payment of them against personal representatives, when the lessor has been deprived of his legal remedy by the mere accident of the defendant's death. But where the lessor was delayed from recovering an ejectment by a rule of the court of law, and by an injunction at the instance of the defendant, who ultimately failed both at law and in equity, the court decreed an account of the mesne profits against his (the defendant's) executors.(c)

An actual occupation of the premises by the defendant, during the period for which the damages are claimed, is unnecessary; it is sufficient if he was interested in and derived benefit from the premises during that period, as, for example, *where it was proved that the defendant, holding at that time lawfully, had underlet to H., and that the defendant and H.'s interest became determined, and the right of possession vested in the plaintiff, and that H. notwithstanding held on, and continued to pay rent to the defendant, who also declared H. to be his tenant when the plaintiff demanded of him possession.(d) But at the same time proof of actual occupation is always sufficient to charge

(a) Goodtitle *v.* Tombs, 3 Wils. 118; Cutting *v.* Derby, Blk. 1077.

(b) Chamier and another *v.* Lingon, 5 M. & S. 64; S. C., 2 Chitty, 410.

(c) Pultney *v.* Warren, 6 Ves. J. 73.

(d) Doe *v.* Harlow, 12 Ad. & Ell. 40; *vide*, Burne *v.* Richardson, 4 Taunt, 720, and note (d) to Doe *v.* Harlow, p. 42.

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[1] In the case of one joint tenant, or tenant in common, recovering against his partner, it is incumbent on the plaintiff to obtain possession in a reasonable time after judgment in ejectment, and, if he be remis herein for years, he shall not charge the defendant as a trespasser. Hare v. Fuery, 3 Yeates' Rep. 13.

Langendyck v. Burhans, 11 Johns. Rep. 461.

Tenants in common, recovering land in ejectment against a tenant in common, may bring a joint action for mesne profits. Camp v. Homesley, 11 Iredell, 211.

[2] Holdfast *v.* Shepard, 9 Iredell, 222.

the defendant; for any person found in possession after a recovery in ejectment is liable to this action; and it is no defence to [*384] *say that he was upon the premises as the agent and under the license of the defendant in ejectment, for no man can license another to do an illegal act. The measure of the damages, however, in cases of this description, will not be the whole mesne profits of the lands, but will depend upon the time the defendant has had them in his occupation, and all the other peculiar circumstances of the case.(*a*)

In the case of *Keech d. Warne* v. *Hall*,(*b*) where it was decided that a mortgagee might recover in ejectment without a previous notice to quit, against a tenant claiming under a lease from the mortgagor, granted after the mortgage, without the privity of the mortgagee, it was asked by the counsel for the defendant, if such mortgagee might also maintain an action against the tenant for mesne profits, which would be a manifest hardship and injustice to the tenant, as he would then pay the rent twice. Lord Mansfield, C. J., gave no opinion on that point; but said, there might be a distinction, for the mortgagor might be considered as receiving the rent in order to pay the interest, by an implied authority from the mortgagee, until he determined his will.(*c*)[1]

*OF THE PLEADINGS.

The declaration in the action for mesne profits must expressly state the different parcels of land from which the profits arose, or the defendant may plead the common bar. It should also state the time when the defendant broke and entered the premises and ejected the plain- [*385] tiff, the length of time during *which he so ejected him, and the value of the mesne profits of which he deprived him; and a declaration which does not contain these statements will be holden ill on special demurrer; but the defect is cured by verdict, or after judgment by default and writ of inquiry executed, by the operation of the stat. 4 Ann. c. 16.(*d*)

(*a*) Girdlestone *v.* Porter, K. B. M. T. 39 Geo. III. Wood. L. & T. 511.
(*b*) Doug. 21; ante, 29.
(*c*) *Et vide*, 4 Ann. c. 16, s. 10.
(*d*) Higgins *v.* Highfield, 13 East, 407.

[1] A mortgagee is entitled to recover rents and profits, against the mortgagor's assignee, from the time of the plaintiff's notice to quit, and, in the absence of such notice, from the service of the writ, Lyman *v.* Mower, 6 Verm. 345. But see Sanderson *v.* Price, 1 New Jersey Rep. 636.

In the statement of the damages in the declaration, the costs of the ejectment may be included, whether the judgment be against the casual ejector, or against the tenant or landlord; and when the judgment is against the casual ejector, for want of an appearance, the costs are invariably included in the statement of the damages, though it is more prudent, for reasons already assigned, in other cases to omit them;(*a*) and in a case, where, after a recovery in ejectment, and before an action for mesne profits, the defendant became bankrupt, and the lessor inserted the taxed costs of the ejectment as damages in his action for mesne profits, but the jury did not include them in their verdict in executing a writ of inquiry therein, the court refused to set aside the inquisition; because the costs being a liquidated debt, the plaintiff might have proved them under the defendant's commission of bankruptcy, and as he had chosen to take the chance of recovering in an oblique way, more than he could have recovered in a direct manner, and had failed, the court did not think it necessary to assist him.(*b*)[1]

(*a*) Gulliver *v.* Drinkwater, 2 T. R. 261; Doe *v.* Davies, 1 Esp. 358; *et vide*, Utterson *v.* Vernon, 3 T. R. 539, 47; ante, 297.

(*b*) Gulliver *v.* Drinkwater, 2 T. R. 261.

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[1] Where, during the pendency of an action of ejectment, the defendant gives up the possession to a third person, and afterwards the plaintiff recovers judgment, such third person is liable for the mesne profits; the recovery in ejectment is conclusive evidence against him, and he cannot set up a title in himself as a bar. Jackson v. Stone, 13 Johns. Rep. 447.

And it seems, a verdict in ejectment is evidence in an action for mesne profits, against any one in possession of the premises. Jackson ex dem. Church v. Hills, 8 Cow. Rep. 290.

If the tenant has made improvements on the land, under a contract with the owner, he will not be allowed for them in this action when brought by a devisee, but must seek his compensation from the personal representatives of the devisor. Van Alen v. Rogers, 1 Johns. Cas. 281.

It lies against a person who has entered under a contract for a deed, and afterwards refuses to perform the contract. Smith v. Stewart, 6 Johns. Rep. 46.

In relation to third persons the judgment in ejectment is not conclusive; and if they be sued in an action for mesne profits, they may controvert the plaintiff's title at large. Chirac et al v. Reinicker, 11 Wheat. Rep. 280.

In such suit the record of the ejectment is not evidence to establish the plaintiff's title; but it is admissible in connection with an executed writ of possession, to show the fact of possession. Ib.

The action for mesne profits may be maintained against the landlord in fact, who has been in possession of the land by means of his tenants, and who, by his acts, commands, or co operation, aids in the expulsion of the plaintiff, and in withholding possession from him. Ib.

The plaintiffs in such case are not estopped by the consent rule, in the action of ejectment by which another person was admitted to defend the landlord. Ib.

Notice of an ejectment suit, or defence of the suit, by a person, not tenant in possession,

[*386] *The general issue is *not guilty;*[1] *and if the plaintiff declare against the defendant, for having taken the mesne profits for a longer period than six years before action brought, the defendant may plead the Statute of Limitations, namely, *not guilty within six years* before the commencement of the suit, and thereby protect himself from all but six years.(*a*)

(*a*) B. N. P. 88. Subject to the defence founded on the Statute of Limitations, the party entitled to the possession of real property, and of chattels real, may, by the law of England, recover the mense profits from the time his title accrued; and at law, this general right to recover is not affected by any equitable circumstances in the situation of the defendant; such as his ignorance of the plaintiff's right, or an innocent mistake in point of law, as to the construction of a demise, the due execution of a power, and the like, where the defendant may have obtained possession in the fullest confidence of the validity of his title.

In equity there are cases in which the right to mense profits is restricted to the filing of the bill; as where the defendant has possessed in entire and justifiable ignorance of an adverse right, or where the plaintiff has been guilty of laches in prosecuting his claim; see Dormer v. Fortescue, 3 Ashurst, 130, and the cases referred to, 1 Maddock's Chancery, 90, &c.

According to the civil law, and still more according to the law of some of the countries of Europe, which have adopted the principles of the civil law, the right to recover the profits of real property enjoyed without title, and to which the title of the claimant is established, has been restricted to an extent which will appear extraordinary to an English lawyer.

By the civil law as laid down in the Senatus Consultum *de Hæreditatis Petitione;* (D. Lib. 5, Tit. iii. 1, 20, &c.,) *bona fidei* possessors are defined to be those "*qui justas causas habuissent quare bona ad se pertinere existimassent;*" and the distinctions as to liability for intermediate profits in the various cases of *bona fides* and *mala fides* are laid down in the fifth book of the Digest above cited.

Generally, in the case of *bona fide* possession, the true owner was entitled to mesne profits from the time of *litis contestatio* or plea. And the time from which the *bona fidei* possessor was liable, even when held to be *locupletior factus*, (as then having the rents and profits in

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or defendant on record, does not make him a party to the suit in contemplation of law, so as to conclude his rights. Chirac et al. v. Reinicker, 11 Wheat. Rep. 280

[1] An action for mesne profits, is an equitable action, and will allow of every kind of equitable defence. Murray v. Governeur, (in error,) 2 Johns. Cas. 438.

A recovery in trespass for mesne profits, is only for the use and occupation of lands, and does not bar an action of trespass *quare clausum fregit*, for injuries done to the premises during the same period. Gill v. Cole, 1 Harr. & Johns. Rep. 403.

If the plaintiff can prove that his title accrued before the time of the demise in the ejectment, and that the defendant has been longer in possession, he may recover antecedent profits; but in such case the defendant is at liberty to controvert his title. West v. Hughes, 1 Harr. & Johns. Rep. 574.

In trespass for the mesne profits, the defendant is not estopped by the judgment in ejectment from showing that the plaintiff was in possession of the land, between the demise laid in the declaration and the judgment. Ib.

The defendant in ejectment is not estopped from pleading *liberum tenementum* to trespass for the mesne profits, where the term was expired when the judgment in ejectment was entered. Murphy v. Guison's Exr., 2 Hayw. Rep. 381.

*Neither bankruptcy,(*a*) nor a discharge under the Insol- [*387]
vent Debtors' Act,(*b*) can be pleaded in bar to this action; and it has been held that the stat. 6 Geo. IV. c. 16, s. 57, which directs, that all persons *who shall *have given credit* upon good [*388]
and valuable consideration *bona fide*, for any money whatsoever, †which is not due at the time of the bankruptcy, shall be admitted to prove such debts, &c., has been holden not to extend to damages recoverable in an action for mesne profits.(*c*)

his hands in specie and unconsumed,) was the period of final judgment, or, "*rei judicatæ*." See a clear and concise view of the Roman law upon this subject in *Bynkershoek*, (Opera 1, 262.) Lib. 8, c. 12. *Observationem Juris Romani.*

The law of Scotland has gone beyond the civil law in favor of the *bona fidei* possessor; and the case of *bona fides* has been very liberally construed. Many questions involving this doctrine, arose on the leases granted by the late Duke of Queensbury, who being tenant in tail, had granted a great number of leases at inadequate rents, taking very profitable *grassums* or *fines*, a thing which had been held lawful by a series of decisions of the Scotch courts, but finally, the law was settled otherwise by the House of Lords, and all the leases granted on such terms by the Duke were set aside. (1 Bligh, 339.)

The next heir of entail in prejudice of whom these leases had been granted, brought actions for what the law of Scotland terms "*violent profits*;" but it was held in these cases that the *bona fides* of the tenants the lessees continued till the final judgment in the House of Lords referred to.

A second instance of the same kind arose under a lease granted in 1795, by the Earl of Peterborough, as heir of entail, for a long term at a rent fully adequate at the time, to the highest previously received, but taking a sum in hand as *grassum* or *fine;* the next heir of entail instituted an action to reduce the leases, and for "*violent profits.*" The first of these claims was decided on the 9th of March, 1819, by the Court of Session, on the same principle as the Queensbury case, in favor of reducing the lease; and this decision was affirmed by the House of Lords, on the 5th of July, 1822. The affirmance of the judgment in the Queensbury case, by the House of Lords, was on the 12th of July, 1819. In determining on the claim for "*violent profits,*" the Court of Sessions first held that the *bona fidei* possession of the lessee ceased on the 12th of July, 1819, the date of the affirmance in the Queensbury cases; but subsequently fixed the period to be the 9th of March, 1819, the date of the judgment of the Court of Session, reducing and setting aside the lease. The defendant contended that the period when *bona fidei* possession ceased, was the 5th of July, 1822, the date of *affirmance* in the particular case, and again appealed on this ground. It was held on the appeal, that if the only ground of decision had been the point of law, the doubtful state of the law before the affirmance in the Queensbury case might have constituted such affirmance the proper period; but that the facts of the case showed a total want of *bona fides* in the defendant, and that on that ground he was at all events liable from the date of the original reduction, and perhaps from an antecedent period. (Innes *v.* Lady Mordaunt and the Duke of Gordon, 1 Shaw's Scotch Appeals, 169; Innes *v.* Executors of the Duke of Gordon, 4 Wilson and Shaw, 305.)

As to the general principles of the law of Scotland, on this subject, see Erskine, B., 2 Tit. 1, s. 25; Stair. B. 2 Tit. 1, s. 23.

(*a*) Goodtitle *v.* North, Doug. 584.

(*b*) Lloyd *v.* Peel, 3 B. & A. 407.

(*c*) Moggridge *v.* Davis, 1 Whit. 16.

Where the defendant pleaded a plea of *liberum tenementum*, and that the plaintiff was not possessed *modo et forma;* a replication to such plea by way of estoppel, that after the day from which the mesne profits were sought to be recovered, the plaintiff commenced an action of ejectment for the recovery of the same premises on a demise anterior to that day, and had a judgment to recover his term, concluding with a prayer of judgment if the defendant ought during the said term to be admitted, the replication on general demurrer was held good; and a rejoinder, stating that no writ of execution was ever issued, nor had plaintiff ever had possession of the premises, but that a writ of error upon the judgment was still pending and undetermined, was bad.(*a*)

A set-off cannot be pleaded to this action. But where a defendant had made a payment on account of ground-rent, becoming due subsequently to the day of the demise in the declaration in ejectment, the jury were directed to deduct this payment from the amount of the damages, on the ground that it was an outgoing falling due during the time of his occupation, from which he could not exonerate himself, and one which the plaintiff must himself have paid, had he been in possession.(*b*) And in a case where the defendant had a cross claim against the plaintiff for money expended on the premises, a court of Equity granted an injunction to restrain the proceedings at law, because of the absence of the right of set-off in this action.(*c*)

*OF THE EVIDENCE.

When the plaintiff seeks to recover the mesne profits accruing antecedently to the day of the demise in the declaration in the ejectment, he must produce the regular proof of his title, or right to the possession of the premises, and the judgment in ejectment is not admissible in evidence for him. He must also, it appears, in such case prove an entry upon the lands, though some doubt seems to exist as to what proof of entry will be sufficient. By some it has been said, that the plaintiff is entitled to recover the mesne profits only from the time he can prove himself to have been in possession; and that, therefore if a man make his will and die, the devisee will not be entitled to the profits until he has made an actual entry, or in other words, until the day of the demise in the ejectment, for that none can have an action for

(*a*) Doe *v.* Wright, 10 Ad. & Ell. 763.
(*b*) Doe *v.* Hare, 4 Tyr. 29.
(*c*) Cawdor (Earl) *v.* Lewis, 1 You. & C. 427.

mesne profits unless in case of actual entry and possession. Others have holden, that when once an entry has been made, it will have relation to the time the title accrued, so as to entitle the claimant to recover the mesne profits from that time; and they say that if the law were not so, the courts would never have suffered plaintiffs in ejectment to lay their demises back in the manner they now do, and by that means entitle themselves to recover profits, to which they would not otherwise be entitled.(*a*) *The latter seems the [*389] better opinion; but these antecedent profits are now seldom the object of litigation, from the practice of laying the demise and ouster immediately after the time when the lessor's title accrues.(*b*)[1]

(*a*) Metcalf *v.* Harvey, 1 Ves. 248, 249; B. N. P. 87.
(*b*) Ante, 212.

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[1] The record of recovery in ejectment, is conclusive evidence of the title in the lessor of the plaintiff, from the time of the demise laid, against the defendant and his servants; who cannot, therefore, in bar of an action of trespass, show title in another after that time. Dewey v. Osborn, 4 Cow. Rep. 329; Marshall v. Dupey, 4 Marsh. Rep. 389. (New Series.) Poston v. Jones, 2 Dev. & Batt. 294; Chirac v. Reinicker, 11 Wheat. 280; Whittington v. Christian, 2 Rand. 353. Against third persons, however, it is not conclusive, but only admissible to prove the possession. Chirac v. Reinicker, 11 Wheat. Rep. 280.

Where there are several separate demises in a declaration in ejectment, an action of trespass against the defendant or his servants may be maintained in the name of that lessor upon whose title the recovery was had; and where it appeared that the sheriff delivered possession to one of the several lessors, under the *hab. fac. poss.*, this was held *prima facie* evidence that the recovery was upon his title. Ib.

The plaintiff is entitled to the mesne profits, from the time of the demise laid in the declaration in ejectment. Van Alen v. Rogers, 1 Johns. Cas. 281.

The right to mesne profits is a necessary consequence of a recovery in ejectment. Benson et al. v. Matsdorf, 2 Johns. Rep. 369.

The defendant cannot set up a title in bar, even if he have a better title. Ib. Same point, Jackson v. Randall, 11 Johns. Rep. 405.

So, where the lessor had taken possession under the judgment in ejectment, and brought his action for the mesne profits, and the defendant had, in the meantime, brought ejectment for the same premises, and obtained a verdict: he cannot set up the verdict as a bar to the action for mesne profits. Ib.

No defence can be set up in the action for mesne profits, which would have been a bar to the action of ejectment. Baron v. Abeel, 3 Johns. Rep. 481. Same point, Jackson v. Randall, 11 Johns. Rep. 405: Langendyck v. Burhans, 11 Johns. Rep. 461.

After a recovery in ejectment, the lessor of the plaintiff brought trespass for mesne profits, and, pending the suit, conveyed the premises to the defendant, with all his right, title, interest, and claim in the same: held, that the deed was not a release of the mesne profits, but that the plaintiff might nevertheless recover in the action. Duffield v. Stille, 2 Dall. Rep. 156; S. C., 1 Yeates' Rep. 154.

In general, a recovery in ejectment, like other judgments, binds only parties and privies. Chirac et al. v. Reinicker, 11 Wheat. 280.

Where the plaintiff proceeds only for the recovery of the mesne profits, accruing subsequently to the day of the demise in the declaration, the judgment in ejectment is *prima facie* evidence of his right; and it is immaterial whether the judgment is founded on a verdict, or has been obtained by default against the casual ejector; and whether the action is brought *in the name of the real claimant, or the nominal plaintiff in the ejectment. It was formerly holden that the judgment in such cases operated by way of estoppel, and was conclusive evidence of the plaintiff's right to recover,(*a*) but it is now settled law, that no document can operate by way of estoppel unless it appear upon record;(*b*) and therefore upon a plea to this action that the premises were not the premises of the plaintiff, the defendant was permitted to prove title in himself, notwithstanding the proof of the judgment in ejectment against him.(*c*)

The judgment in the preceding ejectment is also evidence in this action against a party coming into possession and occupying the premises under the defendant in the ejectment, although not himself included in it;(*d*) and it is in like manner evidence when the action is brought against a party who has not been in the actual occupation, provided it be proved that the defendant in ejectment was his tenant, and that the relation of landlord and tenant subsisted between them;(*e*) and this re-

(*a*) Aislin *v.* Parkin, Burr, 683; B. N. P. 87.
(*b*) Vooght *v.* Winch, 2 B. & A. 662.
(*c*) Doe *v.* Huddart, 4 Dow. P. C. 437; 5 Tyr. 846.
(*d*) Doe *v.* Whitcomb, 8 Bing. 46.
(*e*) Doe *v.* Harlow, 12 Ad. & Ell. 42, note (*d*).

But such judgment is conclusive evidence, in an action for mesne profits, against the tenant in possession, when he has been duly served with a notice in ejectment, whether he appears and takes upon himself the defence or suffers judgment to go by default against the casual ejector. Ib.

If the plaintiff claims damages for the occupation prior to the demise in the declaration in ejectment, the defendant may dispute the title prior to that time. Jackson v. Randall, 11 Johns Rep. 405.

In trespass for mesne profits, an innocent possessor may set off improvements. Mairs v. Simple, Addis. Rep. 215.

In trespass to try titles, it seems that the record of a previous suit between the ancestor of the plaintiff and the defendant for the same premises may be good evidence to show notice to the latter of a paramount title, in order to fix a period from which the plaintiff is entitled to recover damages for the occupancy of the premise. Kennedy v. Heirs of M'Cartney, 4 Porter's Rep. 141.

lationship must be proved by the production of the agreement, if the tenancy has not been created by parol.(*a*)

But a judgment in ejectment is not evidence *against a previous occupier.(*b*) Nor is a judgment in ejectment against a [*390] wife evidence in an action for mesne profits against the husband and wife, for the wife's confession of a trespass committed by her cannot be given in evidence to affect the husband, in an action in which he is liable for the damages and costs;(*c*)[1] and if the action for mesne profits be brought against the landlord, after a judgment by default against the casual ejector, such judgment will not be evidence against him, without proof that *he received due notice of the service of the ejectment upon the tenant in possession.(*d*)[2] But where a landlord subsequently to the judgment promised to pay the rent and costs to the plaintiff, Lord Ellenborough, C. J., was of opinion, that such promise, there being no proof that he had received notice of ejectment, amounted to an admission that the plaintiff was entitled to the possession of the premises, and that he was a trespasser.(*e*)

When, therefore, the plaintiff seeks to recover such profits only as have accrued subsequently to the demise in the ejectment, no other evidence of his title is, generally speaking, required, than examined copies of the judgment in ejectment, of the writ of possession, and of the sheriff's return thereon;(*g*) but if there is any reason to suppose that the

(*a*) Doe *v.* Harvey, 8 Bing. 239.
(*b*) B. N. P. 87.
(*c*) Denn *v.* White, 7 T. R. 112.
(*d*) Hunter *v.* Britts, 3 Camp. 455.
(*e*) Hunter *v.* Britts, 3 Camp. 455.
(*g*) Astlin *v.* Parkin, B. N. P. 87.

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[1] Where the judgment in ejectment is against the tenant, who comes in and defends, the judgment is sufficient evidence in the action for mesne profits, without any writ of possession executed. Jackson v. Combs, 7 Cow. Rep. 36.

In an action for mesne profits, it is sufficient for the plaintiff to produce the verdict and judgment, where there has been a confession of entry, without proving a title to the land or an entry under the judgment. But, where the judgment in ejectment was obtained by default, an entry must be proved. Lessee of Brown v. Galloway, 1 Peters' Rep. (Circ. Ct.) 299.

[2] In an action for mesne profits, founded on a recovery by default against the casual ejector, it is, in general, necessary to show a writ of possession executed. But not where the tenant voluntarily abandons the possession, and the plaintiff in ejectment enters. Jackson v. Combs, 7 Cow. Rep. 36.

defendant will attempt to answer this *prima facie* case by setting up a title in himself or a third party, or if the case be one of those excepted cases in which the judgment in ejectment is not admissible evidence, then the plaintiff should be prepared with the regular proof of his title, although he does not seek to recover the mesne profits anterior to the day of the demise.

Proof of the execution of a writ of possession is of course necessary, if the plaintiff has been let into possession by the defendant in the action.(*a*) And it has been doubted whether such evidence is ever necessary, except upon judgment by default against the casual ejector, but it is, notwithstanding, prudent to be prepared with it in all cases, unless the plaintiff has been let into possession by the defendant.(*b*)[1]

*The plaintiff must also prove the length of time that the defendant, (or his tenants, if he be the landlord,) have been in possession of the premises, for the judgment in ejectment affords no evidence of possession, and he can only recover damages for the time he proves the defendant to be in actual occupation, or receipt of the rents and profits. The production of the consent rule proves possession, only from the time of the service of the declaration.(*c*)[2]

(*a*) Calvert *v.* Horsefall, 4 Esp. 67.

(*b*) *Vide* Thorp *v.* Fry, B. N. P., 87, *et* S. N. P., 693, (n. 50.) *et* Aislin *v.* Parkin, Burr. 665. The reason assigned for this distinction is, that where the judgment is had against the tenant in possession, the defendant, by entering into the consent rule, is estopped both as to the lessor and lessee, so that either may maintain trespass, without an actual entry, but that, where the judgment is had against the casual ejector, no rule having been entered into, the lessor shall not maintain trespass without an actual entry, and, therefore, ought to prove the writ of possession executed. But this reasoning is not satisfactory; for, if the tenant be concluded by the judgment in the ejectment from controverting the plaintiff's title, it should seem he is also concluded from controverting his possession, for possession is part of his title.

(*c*) Dodwell *v.* Gibbs, 2 C. & P. 615.

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[1] See Shipley *v.* Alexander, 3 Har. & J. 84; Cooch v. Gerry, 3 Harrington, 423; Ainslie *v.* Mayor, &c., of New York, 1 Barb. 168; Poston *v.* Henry. 11 Iredell, 391.

[2] The defendant is not estopped, by the judgment in ejectment, from proving that the plaintiff was in possession of part of the land during the pendency of the action. West *v.* Hughes, 1 Har. & Johns. 574.

OF THE DAMAGES.

*The amount of the damages must also be proved; and as [*391]
the action for mesne profits is an action of trespass *vi et armis*, the jury are not confined in their verdict to the mere *rent* of the premises, although the action is said to be brought to recover the *rents and profits* of the estate, but may give such extra damages as they may think the particular circumstances of the case may demand.(*a*)[1]

If the costs are stated in the declaration as part of the damages, they must of course also be proved in the ordinary manner; and if the ejectment has been defended, his claim is limited to the amount of *the taxed costs* only.(*b*) But where the judgment has been obtained by default against the casual ejector, he is allowed to recover reasonable costs, as between attorney and client,(*c*) and the same principle has been acted *upon with respect to costs incurred by the plaintiff in a Court of Error, in reversing a judgment in ejectment obtained by the defendant,

(*a*) Goodtitle *v.* Tombs, 3 Wils. 118, 121.

(*b*) Brooke *v.* Bridges, 7 B. Moore, 404, 471; Doe *v.* Davis, 1 Esp. 358; Doe *v.* Hare, 2 Dow. P. C. 245.

(*c*) Doe *v.* Huddart, 4 Dow. P. C. 437; 5 Tyr. 846.

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[1] In an action of trespass for mesne profits, against a *bona fide* purchaser, he shall be allowed against the plaintiff, in mitigation of damages, the value of permanent improvements made in good faith, to the extent of the rents and profits claimed by the plaintiff. Jackson v. Loomis, 4 Cow. Rep. 168.

The severance of machinery from a mill does not divest the owner of his property. What was before part of his freehold by the severance becomes personal property, and the owner may recover for the property thus severed in an action of trespass for mesne profits. Morgan v. Varick, 8 Wen. 587.

In such case, where the property remains upon the premises, and is subsequently removed, the statute of limitations is no bar, if the suit for the removal be brought within six years, although more than six years have elapsed since the severance. Ib.

If an injury, for which an action for mesne profits is brought, has been done more than six years before the commencement of the action, and the defendant pleads the statute of limitations, the plaintiff cannot recover, although the injury was done after the action of ejectment was commenced, and the defendant prevented judgment in the ejectment suit, after verdict, by an injunction from chancery. Ib.

In an action for mesne profits, the defendant may set off the value of his improvements; but that value ought, in the first instance, to be deducted from the profits received before the date of the demise, and which the plaintiff is precluded from recovering. Hylton v. Brown, 2 Wash. Cir. Ct. Rep. 165.

See Congregational Soc. in Newport v. Walker, 18 Verm. Rep. 600; Edgerton v. Clark, 20 Verm. 264; Mitchell v. Freedley, 10 Bar. 198.

although they were costs which the Court of Error had no power to allow.(*a*) And in a case where the defendant in ejectment had appeared and pleaded, and afterwards withdrew his plea, the plaintiff was allowed to recover his costs in the action although they had not been taxed.(*b*)[1]

The plaintiff will also be entitled to give evidence of any injury done to the premises,[2] in consequence of the misconduct of the defendant, provided such fact be specially alleged in the declaration.

If, in an ejectment, there be a verdict for the plaintiff, and the defendant bring a writ of error, and enter into a recognizance to pay costs in case of non-suit, &c., pursuant to stat. 16 & 17 Car. II. c. 8, and he be non-suited, &c., the defendant in error needs not bring a *scire facias* or debt on the recognizance, but may sue out an *elegit*, or writ of inquiry, to recover the mesne profits since the first judgment in ejectment.(*c*)[3]

(*a*) Nowell *v.* Roake, 7 B. & C. 404.
(*b*) Symonds *v.* Page, 1 C. & J. 29.
(*c*) Short *v.* Heath, 2 Cromp. Prac. 225.

[1] The plaintiff is entitled to be reimbursed in such amount as he has, in good faith, been compelled to pay in obtaining, by legal means, the restoration of the property which the defendant has wrongfully taken or withheld from him. Doe *v.* Perkins, 8 B. Monroe Rep. 198.

See Alexander v. Herr, 11 Penn. State Rep. 537.

[2] A lessor in an action of ejectment may bring trespass *quare*, &c., against the defendant or his servants, for an injury done to the freehold intermediate the verdict and *hab. fac. poss.* executed. Dewey v. Osborn, 4 Cow. Rep. 329.

[3] Where, after a recovery in ejectment, the plaintiff makes and files a suggestion of his claim for mesne profits, and the defendant pleads thereto, and a trial is had, and the plaintiff does not recover more than fifty dollars, he does not recover costs, but pays costs to the defendant. Broughton v. Wellington, 10 Wen. 566.

Where the lessor of the plaintiff dies after judgment in ejectment, the execution may issue in the name of the lessee, without the necessity of a *scire facias*. Lessee of Penn v. Klyne et al., 1 Peters' Circ. Ct. Rep. 446.

APPENDIX.

ENGLISH FORMS IN EJECTMENT.

No. 1.

Notice to quit by the landlord to a tenant from year to year.

SIR,

I hereby give you notice to quit and deliver up, on the day of next, the possession of the messuage or dwelling-house, (or "rooms and apartments," or "farm lands and premises,") with the appurtenances, which you now hold of me, situate in the parish of in the county of

Dated the day of 18 Yours, &c.,
A. B.

To Mr. C. D., (the tenant in possession:) or (if it be doubtful who is tenant,) To Mr. C. D., or whom else it may concern.

No. 2.

The like, by an agent for the landlord.

SIR,

I do hereby, as the agent for and on behalf of your landlord, A. B., of give you notice to quit and deliver up, on (&c.,) (as in No. 1,) which you now hold of the said A. B., situate, (&c.)

Dated, (&c.) Yours, &c., E. F.,
Agent for the said A. B.

To Mr. C. D., (&c.)

No. 3.

The like, by the landlord, where the commencement of the tenancy is doubtful.

SIR,

I hereby give you notice, &c., (as in No. 1, to "*county of* ,") provided your tenancy originally commenced at that time of the year; or, otherwise, that you quit and deliver up the possession of the said messuage, (&c.,) at the end of the year of your tenancy, which shall expire after the end of half a year from the time of your being served with this notice.

Dated, (&c.)

Yours, &c.
A. B.

To Mr. C. D., (&c.)

No. 4.

The like by a tenant from year to year, of his intention to quit.

Sir,

I hereby give you notice of my intention to quit, and that I shall, on the day of next, quit and deliver up the possession of the messuage, (&c.,) which I now hold of you, situate, (&c.)

Dated, (&c.)

Yours, &c.,
C. D.

To Mr. A. B.

No. 5.

Letter of attorney to enter and seal a lease of the premises.

Know all men by these presents, that I, A. B. of, (&c.,) have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint C. D. of, (&c.,) my true and lawful attorney, for me, and in my name, to enter into and take possession of a certain messuage, &c., late in the tenure and occupation of G. H., situate, (&c.,) but now untenanted; and, after the said C. D. hath taken possession thereof, for me, and in my name, and as my act and deed, to sign, seal, and execute a lease of the said premises, with the appurtenances, unto E. F. of, (&c.,) to hold the same to him, the said E. F., his executors, administrators, and assigns, from the of last past, before the date hereof, for the term of seven years, at the yearly rent of a peppercorn, if lawfully demanded; subject to a proviso, for making void the same, on tendering the sum of sixpence to the said E. F., his executors or administrators. In witness, (&c.)

Sealed and delivered, (&c.)

No. 6.

Affidavit of executing the same.

I. K. of, (&c.,) gentleman, maketh oath and saith, that he was present, and did see A. B. of, (&c.,) named in the letter of attorney hereunto annexed, duly sign, seal, and deliver the said letter of attorney.

Sworn, (&c.) I. K.

No. 7.

Lease.

This indenture made the day of (&c.) between A. B. of, (&c.) of the one part, and E. F. of, (&c.) of the other part, witnesseth, that the said A. B., for and in consideration of the sum of five shillings of lawful money of Great Britain, to him in hand paid by the said E. F. at or before the sealing and delivery of these presents, the receipt whereof the said A. B. doth hereby acknowledge, hath demised, granted and to farm let unto the said E. F., his executor and administrators, all that messuage, (&c.) situate, (&c.) late in the tenure and occupation of G. H., but now untenanted; to have and to hold the same unto the said E. F., his executors and administrators, from the day of last past, before the date hereof, for and during and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended; yielding and paying therefore yearly and every year, during the said term, unto the said A. B. or his assigns, the rent of one peppercorn, if lawfully demanded at the feast of Provided always, and these presents are on this condition, that if the said A. B. or his assigns shall at any time or times hereafter, tender or cause to be tendered unto the said E. F., his executors and administrators, the sum of sixpence, that then and in such case, and from thenceforth, this present indenture, and every thing herein contained, shall cease, determine, and be absolutely void, anything herein contained to the contrary thereof in any wise notwithstanding. In witness whereof, the parties hereto have interchangeably set their hand and seals, the day and year first above written.

Sealed and delivered, as the act and deed of the above named A. B. by C. D. of by virtue of a letter of attorney to him for that purpose, made by the said A. B. bearing date, (&c.) being first duly stamped in the presence of I. K. } A. B. E. F.

No. 8.

Notice to appear, &c.

Take notice, that unless you appear in her Majesty's Court of Queen's Bench at Westminster, within the first four days (or, if in the

country, within the first eight days) of next Term, at the suit of the above named plaintiff E. F., and plead to this declaration in ejectment, judgment will be thereon entered against you by default.

Yours, &c.

To Mr. G. H. I. K., plaintiff's attorney.

No. 9.

Affidavit to move for judgment in K. B.

In the Queen's Bench.

Between { E. F. on the demise of A. B. plaintiff, and G. P. . . . . defendant.

I. K. of gentleman, maketh oath and saith, that on the day of last, he this deponent did see C. D., in the letter of attorney hereunto annexed named, for and in the name of A. B., the lessor of the plaintiff, enter upon and take possession of the messuage in the lease hereto also annexed mentioned, by entering on the threshold of the outer door thereof; and putting his finger into the keyhole of the said door, the said messuage being then locked up and uninhabited, so that no other entry thereon could be made, nor any possession thereof taken, without force; and this deponent further saith, that he did, on the same day, see the above named C. D., after such entry made, and whilst he stood on the threshold of the said door, duly sign and seal the lease hereunto annexed, in the name of the said A. B., and as his act and deed deliver the same unto the said E. F., the plaintiff above named; and that after the said lease was so executed, this deponent did see the said E. F. take possession of the said messuage, by virtue of the said lease, by entering upon the threshold of the said outer door, and putting his finger into the keyhole of the said door, the said messuage being then locked up and uninhabited, so that no other entry could be made thereon, save as aforesaid; and that immediately afterwards, the said G. H., the defendant, came and removed the said E. F. from the said door, and put his foot on the threshold thereof; whereupon this deponent did, on the day and year aforesaid, deliver to the said defendant G. H. who still continued upon the said threshold, a true copy of the declaration of ejectment, and notice thereunder written hereto annexed.

Sworn, (&c.)

No. 10.

Victoria, (&c.) to the sheriff of greeting: If John Doe shall give you security of prosecuting his claim, then put by gages and safe pledges Richard Roe, late of yeoman, that he be before us, on wheresoever we shall then be in England, (or in C. P. "that he be before our justices at Westminster, on ") to show wherefore, with force and arms, he entered into messuages, (&c.)

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with the appurtenances, in which A. B. hath *demised to the said John Doe, for a term which has not expired, and ejected him from his said farm; and other wrongs to the said John Doe there did, to the great damage of the said John Doe, and against our peace: And have you there the names of the pledges, and this writ. Witness ourselves at Westminster, the day of in the year of our reign.

No. 11.

Sheriff's return thereto.

Pledges to prosecute { JOHN DEN, RICHARD FEN.

The within named Richard Roe is attached by pledges { JOHN SMITH. WILLIAM STILES.

No. 12.

Declaration by original, on a single demise, with notice to appear thereto.

In the Queen's Bench.

Term, in the year of the reign of Queen Victoria, (to wit, Richard Roe late of yeoman, was attached to answer John Doe of a plea, wherefore the said Richard Roe, with force and arms, &c., entered into messuages, barns, stables, outhouses, yards, gardens, orchards, acres of arable land, acres of meadow land, and acres of pasture land, with the appurtenances, situate, &c., which A. B. had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm; and other wrongs to the said John Doe there did, to the great damage of the said John Doe, and against the peace of our lady the now Queen, (&c.) And thereupon the said John Doe, by his attorney, complains; that whereas the said A. B. on (&c.) at (&c.) had demised the said tenements with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe and his assigns, from the day of then last past, for and during and unto the full end and term of years from thence next ensuing, and fully to be complete and ended: By virtue of which said demise, the said John Doe entered into the said tenements with the appurtenances, and became and was thereof possessed, for the said term so to him thereof granted: And the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on (&c.,) with force and arms, (&c.,) entered into the said tenements with the appurtenances, which the said A. B., had demised to the said John Doe, in manner and for the term aforesaid, which is not †yet expired,

and ejected the said John Doe from his said farm; and other wrongs to the said John Doe, then and there did, to the great damage of the said John Doe, and against the peace of our said lady the now Queen; wherefore, the said John Doe, saith, that he is injured, and hath sustained damage to the value of £ and therefore, he brings his suit, &c.

No. 13.

Notice to appear.

Mr. C. D.

I am informed that you are in possession of, or claim title to the premises in this declaration of ejectment mentioned, or some part thereof; and I, being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear in next term, (or, in London or Middlesex, "on the first day of next term") in her Majesty's Court of Queen's Bench, wheresoever, her said Majesty shall then be in England, (or, "in her Majesty's Court of Common Bench, or her Majesty's Court of Exchequer at Westminster,") by some attorney of that court; and then and there, by rule of the same court, to cause yourself to be made defendant in my stead: otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession.

Yours, &c.,
RICHARD ROE.

No. 14.

The like on a double demise, with one ouster.

In the Queen's Bench, (or Common Pleas, or Exchequer.)

Term (&c.)

(to wit,) Richard Roe, late of yeoman, was attached to answer John Doe, of a plea, wherefore the said Richard Roe, with force and arms, &c., entered into messuages, (&c.,) with the appurtenances, situate, &c., which A. B. had demised to the said John Doe, for a term which is not yet expired; And also, wherefore, the said Richard Roe, with force and arms, &c., entered into other messuages, (&c.,) with the appurtenances, situate, &c., which E. F. had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said several farms, and other wrongs, (&c.) And thereupon, (&c.,) that whereas, the said A. B., on, &c., at, &c., had demised the said tenements first above mentioned, with the appurtenances, to the said John Doe; to have and to hold *the same to the said John Doe, and his assigns, from the day of then last past, for, and during, and unto the full end and term of years from thence next ensuing, and fully to be complete and ended.*

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And also that whereas the said E. F., on, &c., at, &c., had demised the said tenements secondly above mentioned with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe, and his assigns, from the said day of then last past, for, and during, and unto the full end and term of years from thence, next ensuing, and fully to be complete and ended: By virtue of which said several demises, the said John Doe entered into the said several tenements first and secondly above mentioned with the appurtenances, and became and was thereof possessed, for the said several terms so to him thereof respectively granted: And the said John Doe being so thereof possessed, the said Richard Roe, afterwards, to wit, on, &c., with force and arms, (&c.,) entered into the said several tenements first and secondly above mentioned with the appurtenances, which the said A. B., and E. F., had respectively demised to the said John Doe, in manner and for the several terms aforesaid, which are not yet expired, and ejected the said John Doe from his said several farms; and other wrongs; &c., (as in the preceding precedent with the like notice to appear.)

No. 15.

The like with two ousters.

(As in last precedent to this mark.*) By virtue of which said demise, the said John Doe entered into the said tenements first above mentioned with the appurtenances, and became and was thereof possessed for the said term so to him thereof granted, and the said John Doe being so thereof possessed, the said Richard Roe afterwards, (to wit,) on, &c., with force and arms, &c., entered into the said tenements first above mentioned with the appurtenances, which the said A. B. had demised to the said John Doe, in manner and for the term aforesaid, which is not yet expired, and ejected him the said John Doe from his said farm: And also, that whereas the said E. F. on, &c., at, &c., had demised the said tenements secondly above mentioned with the appurtenances, to the said John Doe; to have and to hold the same to the said John Doe and his assigns, from the said day of then last past, for and during and unto the full end and term of years from thence next ensuing, and fully to be complete and ended: By virtue of which said last mentioned demise, the said John Doe entered into the said tenements secondly above mentioned *with the appurtenances, and became and was thereof possessed for the said last mentioned term so to him thereof granted: And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on, &c., with force and arms, &c., entered into the said tenements secondly above mentioned with the appurtenances, which the said E. F. had demised to the said John Doe, in manner and for the term last aforesaid, which is not yet expired, and ejected the said John Doe from his said last mentioned farm, and other wrongs, &c., (as in No. 14, with the like notice to appear.)

No. 16.

Affidavit of service of declaration in ejectment.

In the Queen's Bench, (Common Pleas, or Exchequer of Pleas.)

Between { John Doe, on the demise of A. B., plaintiff, and Richard Roe, - - - - - - - - defendant.

I. K., of gentleman, maketh oath that he, this deponent, did, on, &c.,* personally serve C. D. tenant in possession of the premises in the declaration of ejectment hereunto annexed mentioned, or (if he be not tenant of the whole) some part thereof, with a true copy of the said declaration, and of the notice thereunder written, hereunto annexed, and this deponent at the same time read over the said notice to the said C. D., and explained to him the intent and meaning of such service,† (or generally thus: and this deponent, at the same time, acquainted the same C. D. of the intent and meaning of the said declaration and notice.)

Sworn, &c. I. K.

No. 17.

The like where there are several tenants.

(As in last precedent to this mark*) personally serve C. D. (&c.) tenants in possession, (&c.) (as in the last) with the said declaration, and the notice thereunto written, by delivering a true copy of the said declaration and notice to each of them, the said C. D., &c., (and if the notice was not directed to all the tenants, say "except that the said notice was directed to each of them the said C. D., (&c.,) separately,") and this deponent, at the same time, read over the same notice to each of them, the said C. D., (&c.,) and explained to them respectively the intent and meaning of such service; (or generally, that "this deponent, at the same time, acquainted each of them, the said C. D., &c., of the intent and meaning of the said declaration and notice."

Sworn, &c. I. K.

No. 18.

The like, where the declaration was served on one tenant, and the wife of another.

(As in No. 16 to*) personally serve C. D., tenant in possesion of part of the premises in the declaration of ejectment hereunto annexed mentioned, with a true copy, &c., (as in No. 16 to †:) And this deponent further saith, that he did, on the same day, also serve G. H., tenant in possession of other part (or residue) of the premises in the said declaration mentioned, with another true copy of the said declaration and notice thereunder written, by delivering the same to, and leaving it with M. H., the wife of the said G. H., at the dwelling-house of the

said G. H., being a parcel of the premises in the said declaration mentioned, and this deponent at the same time read over the notice thereunder written to the said M. H., and explained to her the intent and meaning of such service.

(Sworn, &c.) I. K.

No. 19.

The like, on stat. 4 *Geo. II., c.* 28, *where the premises are untenanted.*

In the Queen's Bench, (&c.)

Between { John Doe, on the demise of A. B., plaintiff, and Richard Roe, ... defendant.

A. B., of lessor of the plaintiff in this case, and I. K., both of gentlemen, severally make oath and say; and first, this deponent, I. K., for himself saith, that he did, on, &c., affix a copy of the declaration in ejectment hereto annexed, and the notice thereunder written upon the door of the messuage in the said declaration mentioned, (or, in case the ejectment is not for the recovery of a messuage, "upon being a notorious place of the lands, tenements or hereditaments, comprised in the said declaration in ejectment,") there being no tenant then in actual possession thereof. And this deponent, A. B., for himself saith, that before such a copy of the said declaration in ejectment was so fixed as aforesaid, there was due to him, this deponent, as landlord of such messuage, (or "lands, tenement, or hereditaments,") with the appurtenances, from C. D., the tenant thereof, the sum of £ for half-a-year's rent, upon and by virtue of a certain indenture of lease, bearing date, &c., and made between, &c., and that no sufficient distress was then to be found upon the said messuage, (or, "lands, tenements, or hereditaments,") with the appurtenances, countervailing the arrears of rent then due to this deponent; and this deponent further saith, that at the time of affixing the copy of the said declaration in ejectment as *aforesaid, he had power to re-enter the said messuage, (or, "lands, tenements, and hereditaments,") with the appurtenances, by virtue of the said lease, for the non-payment of the rent so in arrear, as aforesaid.

Sworn, (&c.) A. B.
I. K.

No. 20.

Rule for judgment, for the whole premises Q. B.

next after in the year of, &c.

Doe on the demise of A. B. } Unless the tenant in possession of (or,
v. Roe, ... } if the premises are untenanted, "unless some person claiming title to") the premises in question shall appear

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and plead to issue, on next after let judgment be entered for the plaintiff, against the now defendant Roe by default.

Upon the motion of Mr.

By the Court.

No. 21.

The like, for part.

Doe on the demise of A. B. } Unless C. D., tenant in possession of part
v. Roe, ... } of the premises in question, shall appear and plead to issue, on next after let judgment be entered for the plaintiff, against the now defendant Roe, by default: But execution shall issue for such part of the premises only as is in his possession.

Upon the motion of Mr.

By the Court.

No. 22.

The like, where part of the premises are tenanted, and part untenanted.

Doe on the demise of A. B. } Unless C. D., (&c.,) tenants in possession
v. Roe, ... } of part of the premises in question, and unless or some other person claiming title to such part of the said premises as are untenanted, shall appear and plead to issue, on next after let judgment be entered for the plaintiff, against the now defendant Roe, by default: but execution shall issue for such part of the premises only as is in the possession of the said tenants, and such other parts as are untenanted.

By the Court.

No. 23.

Judgment for the plaintiff by nil dicit by original in Q. B. with a remittitur damna.

As yet of Term, in the year, &c.

Witness, Thomas Lord Denman

———(to wit,) John Doe, on the demise of A. B., puts in his place I. K., his attorney, against Richard Roe, in a plea of trespass and ejectment of farm.

———(to wit,) The said Richard Roe in person, at the suit of the said John Doe in the plea aforesaid.

———(to wit,) Richard Roe was attached to answer John Doe, &c. (*copy the declaration to the end, omitting the notice, and proceed on a new line as follows:*) And the said R. R., in his proper person, comes and defends the force and injury, when, &c, and says

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nothing in bar or preclusion of the said action of the said J. D., whereby the said J. D. remains therein undefended against the said R. R., therefore, it is considered that the said J. D. recover against the said R. R., his said term yet to come of and in the tenements aforesaid, with the appurtenances; and also his damages sustained by reason of the trespass and ejectment aforesaid:—And hereupon the said J. D. freely here in court remits to the said R. R. all such damages, costs and charges, as might or ought to be adjudged to him the said J. D., by reason of the trespass and ejectment as aforesaid: therefore, let the said R. R. be aquitted of those damages, costs and charges, &c.:—And hereupon the said J. D. prays the writ of the said Lord the King, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his said term yet to come of, and in the tenements aforesaid, with the appurtenances: and it is granted to him, returnable before the said Lord the King, on————wheresoever, &c.

No. 24.

Consent of attorneys, for the tenant to be admitted to defend, &c., in Q. B.

————on (or next after)————in the————year, &c.

————(to wit) Doe on the demise of A. B. against Roe, for messuages (&c.) in the parish of in the said county: (*or, if there be several demises say*) "Doe, on the demise of A. B. for messuages, (&c.) in the parish of in the said county, and also on the demise of E. F., for other messuages, (&c.) in the parish of in the said county, against Roe;" *and if the tenant appear for part only, add,* "being part of the premises mentioned in the declaration."

It is ordered by the consent of the attorneys for both parties, that C. D. be made defendant in the stead of the now defendant Roe, and do forthwith appear at the suit of the plaintiff; and (*if the ejectment be by *bill*) file common bail, and receive a declaration in an action of trespass and ejectment, for the premises in question, which said premises, he the said C. D., does hereby admit to be or consist of, (*Here describe the premises for which it is intended to defend,*) for which he intends as (tenant or landlord, as the case may be) to defend this action of trespass and ejectment. And it is further ordered by the like consent, that the said C. D. do forthwith plead not guilty thereto; and upon the trial of the issue, *confess lease, entry, and ouster, and that he was, at the time of the service of the said declaration, in possession of the premises hereinbefore mentioned and specified, and insist upon the title only, otherwise let judgment be entered for the plaintiff against the now defendant Richard Roe, by default, and if upon trial of the said issue, the C. D. shall not confess lease, entry, and ouster, and such possession as aforesaid, whereby the plaintiff shall not be able further to prosecute his (*writ* or *bill*) against the said C. D., then no costs shall be allowed for not further prosecuting the same, but the said C. D. shall pay costs to the plaintiff, in that case to be taxed by the master. And it is fur-

ther ordered, that if, upon the trial of the said issue, a verdict shall be given for the said C. D., or it shall happen that the plaintiff shall not further prosecute his the said (*writ* or *bill*) for any other cause than for not † confessing lease, entry, ouster, and such possession as aforesaid, then the lessor of the plaintiff shall pay to the said C. D., costs in that case to be adjudged.

I. K., attorney for plaintiff.
L. M., attorney for defendant.

No. 25.

Consent rule in C. P.

In the Common Pleas.

——— Term in the ——— year, &c.
——— the ——— day of
——— (to wit) Doe, on the demise of A. B. against Roe. } It is ordered by consent of I. K., attorney for the plaintiff, and L. M., attorney for C. D., who claims title to the tenements in question, which premises he, the said C. D. hereby admits to be or consist of (*here describe the premises for which it is intended to defend*) for which he intends (as *tenant* or *landlord*) to defend this action of trespass and ejectment, that he may be admitted defendant, and that the said defendant shall immediately appear by his attorney, who shall receive a declaration, and plead thereto the general issue, this Term; and at the trial thereupon to be had, the said defendant shall appear in his own proper person, or by *counsel or attorney, and confess lease, entry, and ouster, and that he was, at the time of the service of the declaration, in possession of the premises hereinbefore mentioned and specified, and insist upon the title only, otherwise let judgment be entered for the plaintiff against the now defendant by default. And by the like consent, it is ordered, that if, upon trial of the said issue, the said C. D. shall not confess lease, entry, and ouster, and such possession as aforesaid, whereby the plaintiff shall not be able further to prosecute this action against the said C. D., then no costs shall be allowed for not further prosecuting the same, but the said C. D. shall pay costs to the plaintiff's lessor in that case, to be taxed by the prothonotary. And it is further ordered by the like consent, that if, upon the trial of the said issue, a verdict be found for the said C. D., or it shall happen that the plaintiff shall not further prosecute his said action for any other cause than for not confessing lease, entry, and ouster, and such possession as aforesaid, then the lessor of the plaintiff shall pay to the said C. D. costs in that case to be adjudged.

By the Court.

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No. 26.

Affidavit in support of rule, to authorize the tenant to confess lease and entry only in Q. B.

In the Queen's Bench.

C. D. of &c., maketh oath and saith, that no actual ouster of the lessor of the plaintiff has been committed by this deponent, and that (as he this deponent verily believes) this ejectment may involve a question between tenants in common, or joint-tenants.

Sworn, (&c.) C. D.

No. 27.

Rule in Q. B. to authorize the tenant to confess lease and entry only.

Doe, on the demise of *A.* v. *Roe* . . . . . Upon reading the rule made yesterday, and upon hearing Mr. ——, &c., for the lessor of the plaintiff, and Mr. ——, &c., for the tenant; it is ordered, that the defendant enter into a rule for confessing lease, entry, and possession, and also for confessing ouster of the nominal plaintiff, in case an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise.

By the Court.

No. 28.

Consent rule thereon.

Doe v. *Roe*, It is ordered, &c., (as in No. 24, to*) confess lease, entry, and that he was at the time of the service of the declaration in possession of the premises hereinbefore *mentioned and specified, and also ouster of the nominal plaintiff, in case an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise, and insist upon the title and such actual ouster only; otherwise let judgment be entered for the plaintiff against the now defendant Roe, by default. And if, upon the trial of the said issue, the said C. D. shall not confess lease and entry, and also ouster upon the condition aforesaid, whereby, &c., (*as in No. 24 to*†) confessing lease, entry, and such possession as aforesaid, and also ouster subject to the conditions aforesaid, then the lessor of the plaintiff shall pay to the said C. D. costs in that case to be adjudged.

By the Court.

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No. 29.

Rule in Q. B. for admitting the landlord to defend, &c.

Doe, on the demise of *A. B.* v. *Roe* . . . . . } It is ordered that E. F., landlord of the tenant in possession of the premises in question in this cause, shall be joined and made defendant with the said tenant, if he shall appear: And the said E. F. desiring, if the said tenant shall not appear, that he may appear by himself, and consenting that in such case he will enter into the common rule to confess lease, entry, and ouster, in such manner as the said tenant ought, in case he had appeared; (*or if the rule be special, to confess lease and entry only, say* "; to confess lease and entry only, without ouster, unless an actual ouster of the lessor of the plaintiff, by the said C. D., or those claiming under him, he proved at the trial,") leave is given to the said E. F., pursuant to the late act of Parliament, if the said tenant shall not appear, to appear by himself, and upon his entering into such common rule, to become defendant instead of the casual ejector, and to defend his title to the said premises without the said tenant: the plaintiff nevertheless is at liberty to sign judgment against the casual ejector; but execution thereon is stayed, until the court shall further order. Upon the motion of Mr. ———

By the Court.

No. 30.

Plea of not guilty.

C. D. . . . . } ats. Doe, on the demise of A. B. } Term (&c.) And the said C. D., by L. M., his attorney, comes and defends the force and injury, when, &c., and says that he is not guilty of the supposed trespass and ejectment, (or if several ousters are laid in the declaration, " of the supposed trespasses and ejectments,") above laid to his charge, in manner and form as the said John Doe hath above thereof complained against him; and of this, he, the said C. D., puts himself upon the country, &c.

No. 31.

Plea of ancient demesne.

C. D. . . . . } ats. Doe, on the demise of A. B. } And the said —— by —— his attorney comes and defends the force and injury, when, &c., and says that all the tenements and premises in the declaration aforesaid specified, in which the trespass and ejectment are above supposed to have been done, are held of ——— as of his manor of ——— in the county of ——— and which said manor is, and from time whereof the memory of man is not to the

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contrary, was, of ancient demesne of the Crown of the Queen of England, and now of our Lady the Queen; and that the aforesaid tenements and premises are and for all the time aforesaid were pleaded and pleadable in the Court of the same manor by patent writ of our Lady the Queen of right close only and not elsewhere or otherwise; and this he is ready to verify as the Court shall think proper; Wherefore he prays judgment if the Court of our said Lady the Queen, now here will take cognizance of the said plea, &c.

No. 32.

Affidavit to accompany plea of ancient demesne.

C. D., the tenant in possession of the premises in the declaration of ejectment in this cause above mentioned, maketh oath, and saith, that the said premises in the said declaration in this cause above mentioned, with the appurtenances, are held of ——— as of his manor of ——— in the county of ——— and which said manor is holden in ancient demesne: and this deponent further saith, and there is a Court of ancient demesne held within the said manor of ——— and that there are suitors in the same Court, in which said Court, and before which suitors, the said A. B., the lessor of the plaintiff above named, might have proceeded in the said ejectment; and this deponent further saith, that to the best of this deponent's knowledge and belief, the said A. B., the said lessor of the plaintiff, is seized in his demesne as of fee of and in the said premises, with the appurtenances in the said declaration of ejectment mentioned. C. D.

Sworn, &c.

*No. 33.

Postea for defendant on a non-suit for not confessing lease, entry and ouster.

Afterwards, that is to say, on, &c., at, &c., before, (&c.) comes the within-named John Doe, by his attorney within mentioned, and the within-named C. D., although solemnly required, comes not, but makes default; therefore, let the jurors of the jury whereof mention is within made, be taken against him by his default; and the jurors of that jury being summoned also to come, and to speak the truth of the matters within contained, being chosen, tried and sworn, the said C. D., although solemnly called to appear by himself, or his counsel or attorney, to confess lease, entry and ouster, and possession of the premises hereinbefore mentioned, doth not come, by himself or his counsel or attorney, nor doth he confess lease, entry, ouster, and possession, but therein makes default; wherefore the said John Doe doth not further prosecute his writ (or bill) against the said C. D.

Therefore, &c.

No. 34.

Judgment for the plaintiff, as to part of the premises, and for the defendant, on a nolle prosequi, as to the residue.

(*To the end of the issue, and then as follows:*) At which day before our Lady the Queen, at Westminster, (*or in the Common Pleas or Exchequer*, "At which day comes here,") the parties aforesaid, by their attorneys aforesaid; and hereupon the said C. D. as to ——— parcel of the tenements in the said declaration mentioned, relinquishing his said plea by him above pleaded, says that he cannot deny the action of the said John Doe, nor but that he, the said C. D., is guilty of the trespass and ejectment above laid to his charge, in manner and form as the said John Doe hath above thereof complained against him; and upon this, the said John Doe says, that he will not further prosecute his suit against the said C. D. for the trespass and ejectment in the residue of the tenements aforesaid; and he prays judgment, and his term yet to come, of and in the said ——— with the appurtenances, parcel, &c., together with his damages, costs and charges by him in this behalf sustained: Therefore it is considered, that the said John Doe do recover against the said C. D., his said term yet to come of and in the said ——— with the appurtenances, parcel, (&c.) and also £—— for his said damages, costs and charges, by the Court of the said Lady the Queen, now here adjudged to the said John Doe, and with his assent, and also with the assent of the said C. D.: And let the said C. D. be acquitted of the said trespass and ejectment in the residue of the tenements aforesaid, and *go thereof without day, (&c.:) And the said John Doe prays the writ of our said Lady the Queen, to be directed to the sheriff of ——— aforesaid, to cause him to have possession of his said term yet to come, of and in the said ——— with the appurtenances, parcel, (&c.,) and it is granted to him, returnable before our said Lady the Queen, on ——— wheresoever, (&c.) (*or in the Common Pleas or Exchequer*, "returnable here on——— &c.")

No. 35.

Rule for execution against the casual ejector, where the landlord had been made defendant, and failed at the trial.

Doe, on the demise of A. B. *v.* Roe . . . . . } Upon reading a rule made in this cause on ——— and E. F. therein named, having made himself defendant in the stead of the casual ejector, pursuant to the said rule, and the postea in the said cause being produced and read, and a rule made in the same cause this day; it is ordered that the said E. F., upon notice of this rule to be given to his attorney, (&c.) show cause, why the plaintiff should not have leave to sue out execution, upon the judgment signed against the casual ejector pursuant to the first mentioned rule. Upon the motion of Mr. —— By the Court.

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No. 36.

Habere facias possessionem.

Victoria, (&c.) To the sheriff of ——— greeting: Whereas John Doe lately in our Court before us at Westminster, by our writ, (*or if by bill, say* "by bill without our writ,") and by the judgment of the same Court recovered against C. D. (*or if the judgment be by default* "against Richard Roe,") his term‡ then and yet to come of and in ——— dwelling-houses, (&c.) (*as in the declaration in ejectment,*) with the appurtenances, situate (&c.) which A. B. on (&c.) had demised to the said J. D. to hold the same to the said J. D. and his assigns, from (&c.) for and during and until the full end and term of ——— years from then next ensuing, and fully to be complete and ended, * by virtue of which said demise, the said J. D. entered into the said tenements with the appurtenances, and was possessed thereof, until the said C. D. afterwards (to wit,) on (&c.) with force and arms, (&c.) entered into the said tenements with the appurtenances, which the said A. B. had demised to the said J. D. in manner, and for the term aforesaid, which was not then, nor is yet expired, and ejected the said J. D. from his said farm ☞; whereof the said C. D. is convicted, as appears to us of record; therefore we command you, that without delay you cause the said J. D. to have the *possession of his said term yet to come of and in the tenements aforesaid, with the appurtenances: and in what manner you shall have executed this our writ, make appear to us, on wheresoever we shall then be in England, (or by bill, "to us at Westminster, on next after ,"†) and have there (or by bill, "have there then,") this writ.

Witness, Thomas Lord Denman, (&c.)

No. 36. (*a*)

The like, on a double demise.

(As in preceding precedent to *;) and also his term, then, and yet to come, of and in other dwelling-houses, (&c.) with the appurtenances, which E. F. on, (&c.) had demised to the said J. D., to hold the same to the said J. D. and his assigns, from, &c. for, and during, and unto, the full end and term of years from thence next ensuing, and fully to be complete and ended; by virtue of which said several demises, the said J. D. entered into the said several tenements with the appurtenances, and was possessed thereof, until the said C. D. afterwards, to wit, on, (&c.) with force, and arms, (&c.) entered into the said several tenements, with the appurtenances, which the said A. B. and E. F. had respectively demised to the said John Doe, in manner, and for the several terms aforesaid, which were not then, nor are yet expired, and ejected the said J. D. from his said several farms; whereof the said C. D. is convicted, (*adding in Q. B.* "as appears to us of record;") therefore we command you, that without de-

lay, you cause the said J. D. to have the possession of his said several terms, yet to come of, and in, the said several tenements with the appurtenances: and in what manner, &c. (*as in preceding precedent to the end.*)

No. 37.

The like, when the Judge has certified under stat. 1 *Wm. IV.* c. 70.

Victoria, (&c.) to the sheriff of greeting: Whereas at the assizes holden at in and for the county of on the day of last, before Sir Nicholas Conyngham Tindal, Knt. L. C. J., (&c.) a cause came on to be tried, in which John Doe was the plaintiff, and C. D. the defendant, and in which cause the said John Doe sought to recover against the said C. D. his term, (*as in precedent No.* 36, *from* ‡ *to* ☞.) And whereas at the trial of the said cause, the jury found a verdict for the said John Doe, and the said Sir Nicholas Conyngham Tindal hath duly certified on the back of the said record in the said action, according to the *form of the statute in that case made and provided, his opinion that a writ of possession ought to issue immediately: therefore, &c. (*as in precedent No.* 36 *to the end.*)

No. 38.

The like, and fieri facias for costs, by original in Q. B.

(*As in No.* 36, *to* †.) We also command you, that of the goods and chattels of the said C. D., in your bailiwick, you cause to be made £ which the said J. D., lately in our said court before us, at Westminster, aforesaid, recovered against the said C. D. for his damages, which he had sustained, as well on occasion of the trespass and ejectment aforesaid, as for his costs and charges by him, about his suit, in that behalf expended; whereof the said C. D. is convicted, as appears to us of record: and have you the moneys before us, on the return day aforesaid, wheresoever, (&c.) to be rendered to the said John Doe, for his damages aforesaid, and have there this writ. Witness, Charles Lord Tenterden.

No. 39.

The like, and capias ad satisfaciendum for costs, by original in Q. B.

(*As in No.* 36, *to* †.) We also command you, that you take the said C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us, on the return day aforesaid, wheresoever, &c., to satisfy the said J. D. £. which in our said court before us, at Westminster aforesaid, were adjudged to the said J. D., for his damages, which, &c., (*as in preceding precedent to the end.*)

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No. 40.

The like, and also for costs in error, on an affirmance in the House of Lords.

(Copy the last precedent to the end, omitting the words "and have there this writ," and then as follows:) and also £ which in our court of Parliament were adjudged to the said J. D., according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he had sustained and expended by reason of the delay of execution of the judgment aforesaid, on pretext of prosecuting our writ of error, brought thereupon by the said C. D. against the said J. D., in the same Court of Parliament, the said judgment being there in all things affirmed: whereof the said C. D. is also convicted, as by the inspection of the record and proceedings thereof, remitted from our said Court of Parliament into our said court before us, likewise appear to us of record; and have there this writ. Witness, &c.

No. 41.

Writ of restitution.

(As in No. 36, to "whereof the said C. D. is convicted," (&c.) and then as follows:) and whereas we afterwards, to wit, in —— term aforesaid, by our writ, commanded you that without delay you should cause the said J. D. to have possession of his said term, then to come of, and in the tenements aforesaid, with the appurtenances; and that you should make known to us on a day now past, in what manner you should have executed that our writ: and because since the issuing of our said writ, it hath appeared to us, that the said judgment, obtained by the said J. D. in manner aforesaid, was irregularly obtained, and that our said writ thereupon issued improvidently and unjustly; therefore, we command you, that if possession of the tenements aforesaid, with the appurtenances, hath by virtue of our said writ, been given or delivered to the said J. D., then that, without delay, you cause restitution of the said tenements with the appurtenances, to be made to the said G. H., or his assigns, at whose instance the judgment aforesaid hath been set aside by our said court, he the said G. H., being landlord and owner of the tenements aforesaid, with the appurtenances; and that whatever has been done by virtue of our said writ, you deem altogether void, and of no effect, as you will answer the contrary at your peril; and in what manner, &c., (as in No. 34, to the end.)

No. 42.

Scire facias for the plaintiff.

(As in No. 36, to this mark ☞, and then as follows:) and also £—— for the damages which the said John Doe had sustained, as

well on occasion of the trespass and ejectment aforesaid, as for his costs and charges by him, about his suit in that behalf expended; whereof the said C. D. is convicted, as appears to us of record: And now, on the behalf of the said J. D., in our said court before us, we have been informed, that although judgment be thereupon given, yet execution of that judgment still remains to be made to him; wherefore the said J. D. hath humbly besought us to provide him a proper remedy in this behalf: and we being willing that what is just in this behalf should be done, command you, that by honest and lawful men of your bailiwick, you make known to the said C. D., (*if against the casual ejector* "to the said Richard Roe, and also to —— and —— the tenants in possession of the premises aforesaid,") that he (or they) be before us, on ——— wheresoever, (&c.) to show if he *has or knows of anything to say for himself, or (if they have or know, or of either of them hath or knoweth, of anything to say for themselves or himself,) why the said J. D. ought not to have the possession of his said term yet to come of, and in the tenements aforesaid, and also execution of the damages, costs and charges, aforesaid, according to the force, form and effect of the said recovery, if it shall seem expedient for him so to do, and further to do and receive what our said court before us shall consider of him (or them) in this behalf: And have there the names of those by whom you shall so make known to him (or them) and this writ.

Witness, Thomas Lord Denman, (&c.)

No. 43.

Rule for staying proceedings, till a guardian be appointed for an infant lessor to answer costs.

Doe, on the demise of A. B. } Upon reading the affidavit of L. M.,
v. Roe, ... } (&c.,) it is ordered, that the lessor of the plaintiff upon notice, (&c.,) show cause, why further proceedings in this action should not be stayed, until a sufficient guardian be appointed for the lessor of the plaintiff, who will undertake to pay to the defendant such costs as may happen to be adjudged to him; and that, in the mean time, further proceedings be stayed. Upon the motion of Mr. ———

By the Court.

No. 44.

The like till security be given for costs.

Doe, on the demise of A. B., } Upon reading the affidavit of L. M.
v. Roe, ... } and another, it is ordered that the lessor of the plaintiff, upon notice, (&c.,) show cause, why further proceedings in this action should not be stayed, until* sufficient security be given to answer the defendant his costs, in case the plaintiff be non-suited, or a verdict shall be given for the said defendant; and that in the mean time further proceedings be stayed. Upon, (&c.)

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No. 45.

The like, in C. P. until the costs are paid of a former action in Q. B.

(As in No, 44, to*) the costs taxed in a former action brought in the Court of Queen's Bench, on the demise of the lessor of the plaintiff, for the same premises, are paid; and in the mean time and until this court shall otherwise order, that all further proceedings be stayed. Upon, (&c.)

*No. 46.

The like, on payment of mortgage-money, &c.

Upon reading the affidavit of G. H. it is ordered, that the lessor of the plaintiff upon notice, (&c.,) shall show cause, (&c.,) why, upon the defendant's bringing into this court the principal money and interest due to the lessor of the plaintiff upon his mortgage, and also such costs as have been expended in any suit or suits at law or equity upon such mortgage, his costs in this cause to be ascertained, computed and taxed by one of the prothonotaries, the money so brought into this court should not be deemed and taken to be in full satisfaction and discharge of such mortgage; and upon payment thereof to the lessor of the plaintiff, why all proceedings in this action should not be stayed; and why the mortgaged premises, and the lessor of the plaintiff's estate and interest therein, should not be assigned and conveyed, at the cost and charges of the defendants, to such persons as they shall appoint: and why all deeds, evidences and writings, in the custody of the lessor of the plaintiff, relating to the title of such mortgaged premises, should not be delivered up to the defendants, or to such person or persons as they shall for that purpose nominate and appoint.

By the court.

No. 47.

The like, on payment of rent, &c., in Q. B.

Doe, on the demise of A. B., v. Roe, } Upon reading the affidavit of the defendant, it is ordered, upon the said defendants forthwith bringing into court the whole rent due and in arrear, and such sum to answer the costs as the master shall direct, that further proceedings in this cause be stayed. And it is referred to the master to compute the said arrears of rent, and to tax the said costs; and upon the said defendant's paying the said lessor of the plaintiff what the said master shall find due and allowed for the said rent and costs, that all further proceedings therein as to the non-payment of the said rent, be stayed. But it is further ordered, if the said lessor of the plaintiff has any other title to the premises in question, than for the non-payment of the said rent, he is at liberty to proceed. Upon the motion of Mr. ———.

By the court.

AMERICAN FORMS IN EJECTMENT.

[THE precedents which follow, were originally exclusively adapted to the New York Revised Statutes. Most of them were selected by the New York Supreme Court, and annexed to the rules of that court at the October Term, 1829. The residue, (as well as those selected by the Supreme Court) were submitted to the perusal of eminent counsel, and such amendments as he suggested were made. As they have been prepared with very great care, and sanctioned by the highest authority it has been thought advisable not to change them. They are a good basis, and the practitioner can easily modify them, so as to make them conform to the practice of any of the States.]

No. 1.

Declaration in Ejectment for the Entirety; where the Plaintiff claims in Fee; or, for his own Life; or, for that of another.(a)

SUPREME COURT.

Of the term of in the year of our Lord, one thousand eight hundred and

County of to wit: A. B., by E. F., his attorney,(b) complains of C. D. being in custody, &c. For that, whereas the said A. B., on the day of in the year of our Lord one thousand eight hundred and [some day after the title accrued,] (c) was possessed of a certain dwelling-house and garden, [or, "of a certain lot of wood land;" or, "of a certain orchard;" or otherwise, as the case may be,] with the appurtenances, situate in the town of in the said county of and being known and designated as lot [or, "as parcel of lot," or, "as subdivision number of lot,"] number in range of townships, of a certain tract of land called and known as Patent, [or, "Purchase," or, if the premises cannot be so described, then say, "and adjoining northwardly, to lands late in the occupation of G. H.; southwardly, to lands late in the occupation of J. K.; eastwardly, to lands late in the occupation of L. M.; and west-

(a) Vide N. Y. Revised Statutes, part 3, chap. 5, tit. 1, § 10.
(b) Vide Revised Statutes, part 3; chap. 6, tit. 1, § 19.
(c) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 7.

wardly, to lands late in the occupation of N. O.;" or, if there have been no occupants of such adjacent lands, then stating the natural boundaries, if any; and if none, describing such premises by metes and bounds; or in some other way, so that from such description, possession of the premises claimed may be delivered,(*a*) which said premises the said A. B. claims in fee; [or, "for his own life;" or, "for the life of one R. S.," as the case may be;(*b*) and he, the said A. B., being so possessed thereof, the said C. D. afterwards, to wit, on the day of in the year of our Lord one thousand eight hundred and (*c*) entered into the said premises, and ejected the said A. B. therefrom; and unjustly withholds from the said A. B. the possession thereof; to the damage of the said A. B. of dollars; [any nominal sum that the plaintiff shall think proper to state;](*d*) and therefore he brings his suit, &c.

E. F., Attorney for plaintiff.

No. 2.

The like, for an undivided share or interest.

[As in No. 1 to and including the words, "was possessed of," and then proceed as follows:] the one equal undivided moiety, [or, "the one equal undivided third (or, 'fourth,' or other) part," according to the share and interest the plaintiff claims,](*e*) of a certain dwelling-house and gardens, &c., [describing the premises as directed in No. 1,] which said premises the said A. B. claims in fee; [or, "for his own life;" or, "for the life of one R. S.," according as the case may be,](*g*) and he, the said A. B., being so possessed thereof, the said C. D., afterwards, to wit, on the day of in the year of our Lord one thousand eight hundred and thirty, entered into the said one equal undivided moiety, [or, "third," (or, 'fourth,' or other) part," according to the share or interest the plaintiff claims,] of the said premises, and ejected, &c., [as in No. 1, to the end.]

No. 3.

Declaration, where the plaintiff claims for a Term of Years.

[As in No. 1, or No. 2, (as the case may be,) to the end of the description of the premises; and then as follows:] which said premises the said A. B. claims, upon the demise of one R. S., for a term of years,(*g*) to wit, for the term of years, from the day of last past, [or, "in the year of our Lord one thousand eight hundred

(*a*) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 8.
(*b*) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 10.
(*c*) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 7.
(*d*) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 7.
(*e*) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 9.
(*g*) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 10.

and "] thence next ensuing, and fully to be complete and ended; and the said A. B. being so possessed thereof, &c., [as in No. 1, or No. 2, to and including the words, "the said premises," and then as follows:] which the said R. S. had demised as aforesaid, for the term aforesaid, which is not yet expired, and ejected the said A. B. therefrom, &c., [as in No. 1, to the end.]

No. 4.

Declaration by several Plaintiffs.(a)

[Caption as in No. 1.]

County of to wit: A. B., W. X. and Y. Z., by E. F., their attorney, complain of C. D. being in custody, &c. For that whereas, the said A. B., W. X. and Y. Z., on the day of in the year of our Lord one thousand eight hundred and were possessed of a certain dwelling-house and garden, &c. [Describe the premises as directed in No. 1, No. 2, or No. 3, and then proceed as follows:] which said premises the said A. B., W. X. and Y. Z. claim in fee; [or, "for their joint lives;" or, "for the life of R. S.;" or otherwise, as the case may be,](b) and the said A. B., W. X. and Y. Z. being so possessed thereof, the said C. D. afterwards, &c., [as No. 1, No. 2, or No. 3, to the words, "the possession thereof;" substituting the word "them" for the word "him" throughout.]

Second Count: And, also, for that whereas the said A. B., on, &c. [As in No. 1, No. 2, or No. 3, to and including the words, "the possession thereof," and prefixing the word "other" to the description of the premises.]

Third Case: And, also, for that whereas the said W. X., on, &c. [As directed in the second count; substituting the name of "W. X." for that of "A. B.," throughout.]

Fourth Case: And, also, for that whereas the said Y. Z., on, &c. [As directed in the second count; substituting the name of "Y. Z." for that of "A. B.," and conclude as follows:] to the damage of the said A. B., W. X., and Y. Z., of dollars, [any nominal sum the plaintiffs shall think proper to state,] and, therefore, they bring their suit, &c.

E. F., Attorney for plaintiffs.

(a) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 11.

(b) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 10, (vol. 2. p. 304.)

No. 5.

Declaration, in ejectment, for dower.(a)

[Caption as in No. 1.]

County of to wit: E. B., by E. F., her attorney, complains of C. D., being in custody, &c., For that whereas, the said E. B., on the day of in the year of our Lord, one thousand eight hundred and was possessed of the one undivided third part of, &c. [Describe the premises as directed in No. 1,] as her reasonable dower, as widow of A. B., deceased, late the husband of the said E. B.,(b) and the said E. B., being so possessed thereof, the said C. D., afterwards, to wit, on the day of in the year aforesaid, entered into the said undivided third part of the said premises, &c., [as in No. 1, to the end.]

No. 6.

Notice to defendant to be subjoined to declaration.(c)

To Mr. C. D.

You are hereby notified that the declaration, with a copy whereof, you are now herewith served and to which copy this notice is subjoined, will be filed on the day of next, [or, "instant,"] being the first, [or, "second," or other, as the case may be,] day of the next, [or, "present,"] term of the Supreme Court of Judicature of the People of the State of New York: That, upon filing the same, a rule will be entered, requiring you to appear and plead to the said declaration, within twenty days after the entry of such rule: And, that, if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the said declaration.

Dated, this day of 1854.

Yours, &c.,

E. F., Attorney for plaintiff.
[or, A. B., "in person."](b)

No. 7.

Affidavit of personal service of declaration.

SUPREME COURT.

A. B.
v.
C. D.

County of to wit: J. K. of being duly sworn, deposes, and says, that he did, on the day of last past, [or "instant,"]

(a) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 2, (vol. 2, p. 303.) Ibid. tit. 7, § 24, (vol. 2, p. 343.)

(b) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 10, (vol. 2, p. 304.)

(c) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 12, (vol. 2, p. 305.)

personally serve C. B., the defendant in this suit, who is the actual occupant of [or, "the person exercising acts of ownership on," or "claiming title to" or, "claiming some interest in,"] the premises for which this action is brought,(*a*) with a true copy of the declaration hereunto annexed; and also a true copy of the notice, in writing, to the said declaration subjoined, and likewise hereunto annexed; and further this deponent says not. J. K.

Subscribed and sworn, this day of 185
Before me,
L. M., Commissioner, &c.

No. 8.

Affidavit of service (not personal) of declaration and notice.

[The same, (with the omission of the word "personally,") as in No. 7, until and including the words "and likewise hereunto annexed;" and then proceed as follows:] by leaving the same with one T. U., being a person of proper age, at the dwelling-house of the said defendant, C. D., he being absent; (or, "at the residence of the defendant, C. D., because he could not be found;") and further this deponent says not. J. K.

Subscribed and sworn, this day of 185
Before me,
L. M., Commissioner, &c.

No. 9.

Affidavit of Defendant to support Application for Order, that Plaintiff's Attorney produce his Authority for commencing Action.

Supreme Court.

C. D.
ads.
A. B.

County of to wit: C. D., the defendant in this suit being duly sworn deposes and says, that he has not been served with proof in any way, of the authority of E. F., whose name appears on the declaration in this suit, as the attorney for the plaintiff, [or, "plaintiff,"] therein, to use the name, [or, "names,"] of the plaintiff, [or, "plaintiffs,"] named in the said declaration; and further this deponent says not. C. D.

Subscribed and sworn, &c., [as in No. 7.]

(*a*) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 4.
(*b*) Vide Revised Statutes, part 3, chap. 5, tit. 1, §§ 12 and 13.

No. 10.

Affidavit of Plaintiff's Attorney, that he is authorised to commence the Action.(a)

SUPREME COURT.

A. B. }
vs.
C. D. }

County of to wit; E. F., attorney for the plaintiff named in the declaration in this cause, being duly sworn deposes and says, that he has received, [or, "that he did on the day of last past, (or, "instant") receive,"] from the said A. B., the said plaintiff, a written request of him the said plaintiff, desiring this deponent to commence this suit, [or, a written recognition of this deponent's authority to commence this suit;" and further this deponent says not.

Subscribed and sworn, &c., [as in No. 7.] E. F.

No. 11.

Rule that defendant appear and plead.(b)

SUPREME COURT.

A. B. }
vs. } [Date of the rule.]
C. D. }

On filing the declaration in ejectment in this cause, and the notice in writing thereto subjoined, directed to the said defendant; and on reading and filing the affidavit of due service of a copy of said declaration, and of the said notice thereunto subjoined; and on motion of E. F., on behalf of the said plaintiff, it is ordered, that the defendant appear and plead within twenty days, or that this default be entered.(c)

No. 12.

Plea in ejectment.(d)

SUPREME COURT.

C. D. }
ads.
A. B. }

And the said C. D., by G. H., his attorney, comes and says, that he is not guilty of unlawfully withholding the premises claimed by the said A. B., as alleged in the said declaration of the said A. B.: And of this, he, the said C. D., puts himself upon the country: And the said A. B., doth the like, &c.

G. H., Attorney for defendant.

(a) Vide Revised Statutes. part 3, chap. 5, tit. 1, § 15.
(b) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 16, (vol. 2, p. 305.)
(c) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 16, (vol. 2, p. 305.)
(d) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 22, (vol. 2, p. 306.)

No. 13.

General verdict for the plaintiff in ejectment.(a)

Afterwards, that is to say, on the day and at the place within contained, before JOHN SAVAGE, Esquire, Chief Justice, [or, "before J*** S***, Esquire, one of the justices,"] of the Supreme Court of Judicature of the People of this State of New York, [or, "before J*** E***, Esquire, Circuit Judge," as the case may be,] according to the form of the statute in such case made and provided, come as well the within named A. B., as the within named C. D., by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried and sworn, say upon their oath, that the said C. D., is guilty of unlawfully withholding the within described premises from the said A. B.; and that the said A. B., is well entitled to hold the same in fee, [or, "for his own life," or, "for the life of one R. S.;" or, "for a term of years, &c.," as in the declaration,] as the said A. B., hath within complained against him; and they assess the damages of the said A. B., by reason of the matters aforesaid, over and above his costs and charges, by him about his suit in this behalf expended, to six cents; and for those costs and charges to six cents.

No. 14.

General verdict for the plaintiff, for an undivided share or interest.(a)

[As in No. 13, to and including the words, "unlawfully withholding," and then as follows;] one equal undivided moiety, [or, "one equal undivided third, (or, 'fourth,' or, other) part," according to the share or interest found for the plaintiff,] of the premises within described, and that the said A. B., is well entitled to hold the said one equal undivided moiety, &c., in fee, &c., [as in No. 13, to the end.]

No. 15.

Verdict for one of the plaintiffs, where there are several, and for the defendant against the others.(a)

[As in No. 13, to and including the words, "say upon their oath," and then as follows:] that, as to the said A. B. the said C. D. is guilty, &c. [as in No. 13, or No. 14, (as the case may be,) to the end, and then as follows:] and as to the said W. X. and Y. Z., the jurors aforesaid, upon their oath, aforesaid, say, that the said C. D. is not guilty of the matters within laid to his charge, in manner and form as the said W. X. and Y. Z. have within complained against him.

(a) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 23.

No. 16.

Verdict for plaintiff, for part, and for defendant for part.(a)

[As in some one of the preceding sections to and including the words, "chosen, tried and sworn," and then as follows:] as to [describe the part accurately,] parcel of the premises within mentioned, say upon their oath, that the said C. D. is guilty, &c. [as in some one of the preceding sections to the end, and then as follows:] and as to the residue of the premises within mentioned, the jurors aforesaid, upon their oath aforesaid, say, that the said C. D, is not guilty of the matters within laid to his charge, in manner and form as the said A. B. hath within complained against him.

No. 17.

Verdict for the plaintiff, for damages; where his title expired before trial.(a)

[As in No. 13 to and including the words, "say upon their oath," and then as follows:] that the said C. D., at the time of the commencement of this suit, was guilty of unlawfully withholding, &c., and that the said A. B. was then well entitled, &c., [as in the preceding precedents,] and they assess the damages of the said A., by reason of the premises, over and above his costs and charges by him about his suit in this behalf expended, to dollars,(b) and for those costs and charges, to six cents. And the jurors aforesaid, upon their oath aforesaid, further say, that the aforesaid title of the said A. B. to the premises within described, expired after the commencement of this suit, and before the trial, this day, of the issue within contained, to wit, on the day of last past, [or, "in the year of our Lord one thousand eight hundred and ."]

No. 18.

Postea on a verdict for the defendant.

[As in No. 13 to and including the words, "say upon their oath," and then as follows:] that the said C. D. is not guilty of the matters within laid to his chage, in manner and form as the said A. B. hath within complained against him.

No. 19.

Special verdict.(c)

[As in No. 13, to and including the words, "say upon their oath," that, &c., state the facts, and then proceed as follows:] But whether or

(a) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 23.

(b) It seems that these damages must be assessed by the jury at the trial, and cannot be recovered by a suggestion, in the manner provided in the Revised Statutes, part 3, chap. 5, tit. 1, §§ 36, 37.

(c) Vide Revised Statutes, part 3, chap. 7, tit. 4, § 79.

not, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the said C. D. is guilty of the matters within laid to his charge, the jurors aforesaid are altogether ignorant; and thereupon they pray the advice of the said Supreme Court of Judicature, before the aforesaid justices thereof: And if, upon the whole matters aforesaid, it shall seem to the said court, that the said C. D. is guilty of unlawfully withholding the within described premises from the said A. B. then the jurors aforesaid, upon their oath aforesaid, say, that the said C. D. is guilty thereof, in manner and form as the said A. B. hath within thereof complained against him; and in that case, they assess the damages of the said A. B., by reason of the matters aforesaid, besides his costs and charges by him about his suit in that behalf expended to and for those costs and charges to But, if upon the whole matter aforesaid, it shall seem to the said court that the said C. D. is not guilty of the matters aforesaid, then the jurors aforesaid, upon their oath aforesaid, say, that the said C. D. is not guilty thereof, in manner and form as he hath within in pleading alleged. And because, &c. [Add continuance by *curia advisari vult*, as in No. 21, *post*, pp. 492, 493.]

No. 20.

Judgment for the plaintiff, on a verdict in ejectment.

SUPREME COURT.

Pleas before the Justices of the Supreme Court of Judicature of the People of the State of New York, at the capitol in the city of Albany,(*a*) of the term of [the term of which issue is joined] in the year of our Lord one thousand eight hundred Witness, JOHN SAVAGE, Esquire, Chief Justice.

Fairlie, Paige, Hubbard & Oliver, *Clerks.*

County, to wit. Be it remembered, that on the , Monday, [or, "on the day"] of in this same term of before the Justices of the Supreme Court of Judicature of the People of the State of New York, at the in the of comes A. B., by E. F., his attorney, and brings into the said court, before the aforesaid justices thereof, now here, his certain bill against C. D., being in custody, &c., in a plea of ejectment, which said bill follows in these words, that is to say: county to wit. A. B. by E. F., his attorney, complains of C. D., being in custody, &c. For, that whereas, &c. [here copy the declaration to the end, and proceed on a new line as follows:]

(*a*) Or, "at the city hall in the city of New York."

And the said C. D., by G. H., his attorney, comes and says, that he is not guilty of unlawfully withholding the premises claimed by the said A. B. as alleged in his said declaration; and of this he, the said C. D., puts himself upon the country; and the said A. B. doth the like. Therefore the issue above joined, is ordered by the said Supreme Court to be tried at the Circuit Court appointed to be held at the court house in the of in and for the county of aforesaid, [or, if in the city of New York, "at the Circuit Court, [or 'sittings,') appointed to be held at the city hall, in and for the said city and county of New York,"] on the day of next. And now at this day, to wit, the day of in the year of our Lord one thousand eight hundred and before the said Justices of the Supreme Court of Judicature aforesaid, at the in the of comes the said A. B., by his attorney aforesaid; and the said chief justice [or, "justice," or, "circuit judge,"] before whom the said issue was tried, hath sent hither his record, had before him, in these words, to wit: Afterwards, that is to say, on the day and at the place within contained, before JOHN SAVAGE, Esquire, Chief Justice, [or, "before J. S., Esquire, one of the Justices,"] of the Supreme Court of Judicature of the People of the State of New York, [or, "before J. E., Esquire, one of the said Circuit Judges,"] within mentioned, according to the form of the statute in such case made and provided, come as well the within named A. B. as the within named C. D., by their respective attorneys within mentioned; and the jurors of the jury whereof mention is within made, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried and sworn, &c. [Here copy the postea, and then proceed as follows:

Therefore it is considered, that the said A. B. do recover against the said C. D. the possession of the said premises, according to the said verdict of the said jury.(*a*) And it is further considered, that the said A. B. do recover against the said C. D., his damages, costs and charges by the jury aforesaid, in form aforesaid assessed, and also dollars, for his said costs and charges, by the said Supreme Court, before the aforesaid justices thereof, now here, adjudged of increase to the said A. B., and with his assent, which said damages, costs and charges, in the whole, amount to dollars. And hereupon the said A. B. prays the writ of the People of the State of New York to be directed to the sheriff of the county [or, "city and county,"] aforesaid, to cause him to have possession of the said premises, according to the force, form and effect of his said recovery; and it is granted to him returnable before the said justices of the Supreme Court of Judicature aforesaid, at the in the of on the Monday of next.

Judgment signed this day of in the year of our Lord one thousand eight hundred and

(*a*) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 26.

No. 21.

The like, with a Continuance before Verdict, and a Continuance after Verdict by CURIA ADVISARI VULT.

[As in No. 20, to the end of the order for trial, and then as follows:] And because the aforesaid issue, so as above joined in this cause between the parties aforesaid, was not tried at the said Circuit Court [or, if in the city of New York, "at the Circuit Court, (or, sittings,)] held at the time and place last aforesaid, in and for the said county, [or, "city and county;"] of Therefore the process between the parties aforesaid is continued until the Circuit Court appointed to be held at the court house in the town of in and for the county of aforesaid, [or, "until the sittings, (or, 'Circuit Court,') appointed to be held at the city hall, in the city of New York, in and for the said city and county,"] on the day of in the year of our Lord one thousand eight hundred and

And now at this day, to wit, the Monday of in the year of our Lord one thousand eight hundred and before the Justices of the Supreme Court of Judicature aforesaid, at the in the of comes the said A. B., by his attorney aforesaid: And the said chief justices [or, "justice," or, "circuit judge,"] before whom the said issue was tried, has sent hither his record had before him in these words, to wit: Afterwards, &c. [Here copy the postea, and then proceed as follows:] And because the said court, before the aforesaid justices thereof, now here, and not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, before the said Justices of the Supreme Court of Judicature aforesaid, at the in the of until the Monday of next, to hear the judgment of the said court thereupon; for that the said court, before the aforesaid Justices thereof, now here, are not yet advised, &c. At which day, before the said Justices of the Supreme Court of Judicature aforesaid, at the in the of come as well the said A. B., by his attorney aforesaid, as the said C. D., by his attorney aforesaid: And thereupon all and singular the premises being seen, and by the said court, before the aforesaid justices thereof, now here, fully understood, and mature deliberation being thereupon had, it is considered by the same Court, that the said A. B. do recover against the said C. D., the possession, &c. [as in No. 20, to the end.]

No. 22.

The like, for the Plaintiff, as to Part of the Premises, and for the Defendant as to the Residue.

[As in No. 20, to the postea; then copy the postea, as in No. 16, ante, p. 490, and proceed as follows:] Therefore it is considered that

the said A. B. do recover against the said C. D., his said term yet to come, [or, "said possession,"] of and in the said parcel, &c., with the appurtenances, and the damages, costs and charges aforesaid, in form aforesaid assessed, and also dollars, for his said costs and charges, by the said Supreme Court, before the aforesaid justices thereof, now here adjudged of increase to the said A. B., and with his assent; which said damages, costs and charges in the whole amount to dollars. And as to the residue of the tenements in the said declaration mentioned, whereof the said C. D. is acquitted in form aforesaid, let the said C. D. go thereof without day, &c. And hereupon the said A. B. prays the writ, &c. [as in No. 20.]

Judgment signed, &c. [as in No. 20.]

No. 23.

No. 23. *The like, in another Form.*

[As in No. 20, to the postea; then copy the postea, as in No. 16, ante, p. 490, and proceed as follows:]

Therefore it is considered, that the said A. B. do recover against the said C. D. the possession of the said parcel of the said premises, according to the said verdict of the said jury.(*a*) And it is further considered, that the said A. B. do recover against the said C. D. his damages, costs and charges, by the jury aforesaid in the form aforesaid assessed, and also dollars, for his said costs and charges, &c. [as in No. 22, to the end.]

Judgment signed, &c. [as in No. 20.]

No. 24.

The like, for the Plaintiff, as to part of the premises and NOLLE PROSEQUI, *as to the Residue, for which there was no finding by the jury; with award of* HABERE FACIAS POSSESSIONEM, *and Return.*

[As in No. 20, to the postea; then copy the postea, and proceed as follows:] And thereupon the said A. B. freely here in court confesses that he will not further prosecute his suit against the said C. D. as to the remaining three-fifths [*or, other share as the case may be,] of the tenements in the said declaration mentioned; therefore, as to the said three-fifths of the tenements aforesaid, let the said C. D. be acquitted, and go thereof without day, &c. And the said A. B. prays judgment and his term yet to come [or, "his said possession,"] of and in the said two-fifths of the tenements aforesaid, whereof the said C. D. is convicted, together with his damages, costs and charges aforesaid:

Therefore it is considered, that the said A. B. do recover against the said C. D. his said term yet to come [or, "his said possession,"] of and

(*a*) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 26.

in the said two-fifths of the tenements aforesaid, with the appurtenances, and the damages, costs and charges aforesaid, by the jury aforesaid, in form aforesaid assessed, and also dollars, for his said costs and charges, by the said Supreme Court, before the aforesaid Justices thereof, now here, adjudged of increase to the said A. B., and with his assent; which said damages, costs and charges in the whole, amount to dollars: And hereupon the said A. B. prays the writ of the people of the state of New York, to be directed to the sheriff of the county of aforesaid, to cause him to have possession of his said term yet to come, of and in the said two-fifths of the tenements aforesaid, with the appurtenances; and it is granted to him, returnable before the Justices of the Supreme Court of Judicature aforesaid, at the in the of on the Monday of next. At which day, before the said justices, at the in the of aforesaid, comes the said A. B., by his attorney aforesaid; and the sheriff, to wit: S. T., Esquire, sheriff of the said county, now here returns, that by virtue of the said writ to him directed, he had, on the day of in the year of our Lord one thousand eight hundred and given full and peaceable possession unto the said A. B. of the said two-fifths of the tenements aforesaid, with the appurtenances, in the said writ mentioned, as therein he was commanded.

Judgment signed, &c., [as in No. 20.]

No. 25.

The like, in another Form.

[As in No. 20, to the postea; then copy the postea and proceed as follows:] And thereupon the said A. B. freely here in court, confesses that he will not further prosecute his suit against the said C. D. as to the residue of the said premises in the said declaration mentioned: Therefore, as to the said residue of the premises aforesaid, let the said C. D. be acquitted and go thereof without day, &c. And the said A. B. prays judgment, and the possession of the said parcel of the said premises, according to the said verdict of the said jury,(*a*) together with his damages, costs and charges aforesaid, by the jury aforesaid, in form aforesaid assessed:

Therefore it is considered, that the said A. B. do recover against the said C. D. the possession of the said parcel of the said premises, according to the said verdict of the said jury.(*a*) And it is further considered, that the said A. B. do recover against the said C. D., his damages, costs and charges, by the jury aforesaid, in form aforesaid assessed, and also dollars for his said costs and charges, by the said supreme court, before the aforesaid justices thereof, now here, adjudged of the increase to the said A. B., and with his assent, which said damages, costs and charges, in the whole, amount to dollars. And here-

(*a*) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 26.

upon the said A. B. prays the writ of the People of the State of New York, to be directed to the sheriff of the county [or, "city and county,"] aforesaid, to cause him to have possession of the said parcel of the said premises, according to the force, form and effect of his said recovery; and it is granted to him, returnable before the said Justices of the Supreme Court of Judicature aforesaid, at the in the of on the Monday of next. At which day, &c. [as in No. 24, to the end.]

Judgment signed, &c. [as in No. 20.]

No. 26.

The like, on a special verdict.

[As in No. 20, to the postea, after copying which, proceed as follows:] And because the said court of the same people, before the aforesaid justices thereof, now here, are not yet advised, &c., [as in No. 21, to and including the words, "for that the said court, before the aforesaid justices thereof, now here, are not yet advised thereof, &c."] At which day, before the said Justices of the Supreme Court of Judicature aforesaid, at the in the of come as well the said A. B. as the said C. D. by their respective attorneys aforesaid; And thereupon all and singular the premises being seen, and by the said court, before the aforesaid justices thereof, now here, fully understood, and mature deliberation being thereupon had, for that it appears to the said court here, that the said C. D. is guilty of unlawfully withholding the within described premises from the said A. B.; and that the said A. B. is well entitled to hold the same in fee [or, "for his own life;" or, "for the life of one R. S.;" or, "for a term of years, &c.," as in the declaration] as the said A. B. hath above thereof complained against him: Therefore it is considered, &c., [as in No. 20.]

No. 27.

Judgment for the plaintiff on default.

[As in No. 20, to the end of the declaration, and then as follows:] And now, at this day, that is to say on the Monday, [or, "on the day"] of in this same term, until which day the said C. D. had leave to imparl to the said bill, and then to answer the same, &c., before the said Justices of the Supreme Court of Judicature aforesaid, at in the of comes the said A. B. by his attorney aforesaid, and the said C. D. although solemnly demanded, comes not, but makes default, whereby the said A. B. remains therein undefended against the C. D., wherefore the said A. B. ought to recover against the said C. D., the possession of the premises in the said declaration of the said A. B. described; together with his costs and charges, by him about his suit in this behalf expended.

Therefore it is considered, &c., [as in No. 20, to the end of the award of return of possession, omitting the words, "according to the said verdict of the said jury:" and then as follows:] And it is further considered that the said A. B. do recover against the said C. D.
dollars, for his costs and charges, by him about his suit in this behalf expended, by the court now here adjudged to the said A. B., and with his assent; And hereupon the said A. B. prays a writ to be directed, &c., [as in No. 20, to the end.]

No. 28.

Writ of possession.(a)

The People of the State of New York to the Sheriff of the County [or, "City and County,"] of GREETING: Whereas A. B. has lately, in our Supreme Court of Judicature, by the judgment L. S. of the said court, recovered against C. D. one messuage, &c., [declaring the premises recovered, with the like certainty as required in the declaration,] which said premises have been, and are still unjustly withheld from the said A. B. by the said C. D., whereof he is convicted, as appears to us of record; and forasmuch as it is adjudged in the said court that the said A. B. have execution upon his said judgment against the said C. D. according to the force, form and effect of his said recovery; therefore we command you, that without delay, you deliver to the said A. B. possession of the said premises so recovered, with the appurtenances; and that you certify to our said Supreme Court of Judicature, before our justices thereof, at the capitol in the city of Albany, on the Monday of next, in what manner you shall have executed this writ: And have you then there this writ. Witness, JOHN SAVAGE, Esquire, our Chief Justice, at the in the of this day of in the year of our Lord one thousand eight hundred and

Fairlie, Paige, Hubbard & Oliver, *Clerks.*

E. F., *Attorney.*

No. 29.

Writ of possession with FIERI FACIAS *for costs.*(b)

[As in No. 28, to and including the words "in what manner you shall have executed this writ," and then as follows:] We also command you, that of the goods and chattels of the said C. D. in your bailiwick, you cause to be made dollars, which in our same court were adjudged to said A. B. for the damages which he had sustained, as well on occasion of the matters aforesaid, as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D.

(a) Vide N. Y. Revised Statutes, part 3, chap. 5, tit. 1, § 27.
(b) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 27.

is convicted, as appears to us of record. And if sufficient goods and chattels of the said C. D. cannot be found in your bailiwick, that then you cause the same to be made of the lands, tenements, real estate and chattels real, whereof the said C. D. was seised on the day of in the year of our Lord one thousand eight hundred and or at any time afterwards, in whose hands soever the same may be: And that you have those moneys before our said justices, on the return day aforesaid, to render unto the said A. B. for his damages aforesaid; And have you then there this writ. Witness, JOHN SAVAGE, Esquire, our Chief Justice, at the in the of on the day of in the year of our Lord one thousand eight hundred and

Fairlie, Paige, Hubbard & Oliver, *Clerks.*

E. F., *Attorney.*

No. 30.

Writ of possession, with CA. SA. *for costs.*(*a*)

[As in No. 28, to and including the words "in the manner you shall have executed this writ," and then as follows:] We also command you that you take the said C. D., if he may be found in your bailiwick, and him safely keep, so that you may have his body before our said justices of our said Supreme Court, on the return day aforesaid, to satisfy the said A. B. dollars, which were lately, in our said court, adjudged to the said A. B. for his damages which he had sustained, as well on occasion of the matters aforesaid, as for his costs and charges by him, about his suit in that behalf, expended, whereof the said C. D. is convicted, as appears to us of record: And have you then there this writ. Witness, JOHN SAVAGE, Esquire, our Chief Justice, at the in the of this day of in the year of our Lord, one thousand eight hundred and

Fairlie, Paige, Hubbard & Oliver, *Clerks.*

E. F., *Attorney.*

No. 31.

Suggestion for the recovery of damages in ejectment.(*b*)

And now, at this day, to wit, the day of in the year of our Lord one thousand eight hundred and at the in the of before the said, [or "within mentioned,"] justices of the Supreme Court of Judicature aforesaid, [or "within mentioned,"] comes the said, [or, "within named,"] A. D., by E. F., his attorney, and according to the form of the statute, in such case made and provided,(*c*) suggests to the said court, and gives the said court, before the aforesaid

(*a*) Vide N. Y. Revised Statutes, part 3, chap. 5, tit. 1, § 27.

(*b*) Vide Revised Statutes, part 3, chap. 5, tit. 1, §§ 36, 37, 38.

(*c*) Vide Revised Statute, part 3, chap. 5, tit. 1, §§ 37 & 47.

justices thereof, now here, to understand and be informed, that the said A. B. claims from the said [or, "within named,"] C. D., the sum of dollars; in which sum the said C. D. is indebted to him, the said A. B., for the use and occupation of the premises, in the above, [or, "within,"] written judgment described, from the day of in the year, &c., until the day of in the year, &c., during all which time the said C. D. enjoyed the mesne profits thereof;(a) and the value of which profits,(a) amounts to the said sum of dollars above claimed. And, being so indebted as aforesaid, the said C. D., in consideration thereof afterwards, to wit, on, &c., [some day after the recovery of the judgment,] at, &c., undertook, and then and there faithfully promised the said A. B. to pay him, the said A. B., the said sum of dollars, when he, the said C. D. should be thereunto afterwards requested: Yet, the said C. D., although often requested, &c., hath not yet paid the said sum of dollars, or any part thereof, to the said A. B., but so to do hath hitherto wholly refused, and still doth refuse, to the damage of the said A. B. of the said sum of dollars, above claimed, &c.

E. F., *Attorney for plaintiff.*

No. 32.

Plea to a suggestion.(b)

SUPREME COURT.

C. D. *ads.* A. B.

And the said C. D., by G. H., his attorney, comes and defends the wrong and injury when, &c., and says that he did not undertake or promise in manner and form, as the said A. B. hath above, in his said suggestion in that behalf, alleged against him; and of this he, the said C. D., puts himself upon the country, &c.; and the said A. B. doth the like.

G. H., *Attorney for defendant.*

No. 33.

Judgment for the plaintiff on a verdict in ASSUMPSIT *upon a suggestion to be entered on, or attached to, the record.*(c)

[Copy the suggestion and plea, and other pleadings, if there be any, with imparlances, &c., as in other cases; and then proceed as follows:] Therefore, the issue above joined, is ordered by the said Supreme Court,

(a) Vide N. Y. Revised Statutes, part 3, chap. 5, tit. 1, §§ 41 & 43.
(b) Vide Revised Statutes, part 3, chap. 5, tit. 1, § 37.
(c) Vide Revised Statutes, part 3, chap. 5, tit. 1, §§ 37, 39, 40 & 46.

to be tried at the Circuit Court, appointed to be held at the court-house in the of in and for the county of aforesaid, [or, if in the city of New York, "at the Circuit Court, (or, 'sittings,') appointed to be held at the city hall, in and for the said city and county of New York,"] on the day of next.

And now at this day, to wit, the day of in the year of our Lord one thousand eight hundred and before the said Justices of the Supreme Court of Judicature aforesaid, at the in the of comes the said A. B., by his attorney aforesaid: and the said Chief Justice, [or "justice," or, "circuit judge,"] before whom the said issue was tried, hath sent hither his record, had before him, in these words, to wit: Afterwards, that is to say, on the day, and at the place within contained, before JOHN SAVAGE, Esquire, Chief Justice [or, "before J. S., Esquire, one of the justices,"] of the Supreme Court of Judicature of the People of the State of New York, [or, "before J. E., Esquire, one of the said circuit judges,"] within mentioned, according to the form of the statute in such case made and provided, come as well the within named A. B., as the within named C. D., by their respective attorneys within mentioned; and the jurors of the jury whereof mention is within made, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried, and sworn, say upon their oath, that the said C. D. did undertake and promise in manner and form as the said A. B. hath within suggested against him; and they assess the damages of the said A. B. on occasion of the premises, besides his costs and charges by him about his suit in this behalf expended, to dollars, and for these costs and charges to dollars.

Therefore, it is considered, that the said A. B. do recover against the said C. D., his said damages, costs and charges, by the jurors aforesaid, in form aforesaid assessed, and also dollars, for his said costs and charges, by the said Supreme Court, before the aforesaid justices thereof, now here, adjudged of increase to the said A. B., and with his assent; which said damages, costs and charges in the whole amount to dollars. And the said C. D. in mercy, &c.

Judgment signed, &c., [as in No. 20.]

AMERICAN STATUTES.

For the purpose of giving the student some idea of the practice in ejectment as it exists in various sections of this country, we will now present the statutory provisions of some of the leading States, on this subject:

NEW YORK.

N. Y. Rev. Sts., pt. 3d, ch. 5th, tit. 1.

Sec. 1. Action retained in the cases in which it is now allowed.
2. Other cases in which it may be brought.
3. Who to be plaintiffs in the action.
4. Who to be defendants.
5. How commenced; real claimants to be plaintiffs.
6. Fictitious parties, demises, &c., abolished.
7. Contents of declaration.
8. Premises claimed how to be described.
9. Undivided shares when claimed to be stated.
10. Interest of plaintiff to be stated.
11. Several counts and several plaintiffs may be joined.
12. Application that attorney for plaintiff produce his authority, allowed.
13. Affidavit necessary, to found application.
14. Order of court or officer, upon application.
15. What to be evidence of such authority.
16. When application to be dismissed and defendant to pay costs.
17. In action brought for dower, tender may be pleaded,
18. Right to possession sufficient without actual entry, &c.
19. Leases, entry and ouster not to be proved or confessed.
20. Ouster to be proved in actions by joint tenants, &c.
21. Verdict against all defendants having joint possession.
22. Proceedings when distinct parcels are separately occupied.
23. Verdict how to be rendered in certain cases.
24. Proceedings when plaintiffs' title expires before trial.
25. Not to be abated by death of parties in certain cases.
26. Form of judgment upon verdict and by default.

27. Form of writ of possession upon judgment.
28. Costs how collected on judgment against plaintiff.
29 & 30. Judgments on verdicts to be conclusive; but two new trials may be granted.
31. Effect of judgment by default; new trial thereon.
32. Exceptions of persons under certain disabilities.
33. Exception in case of death of such persons.
34. Possession how affected by recovery on new trial.
35. Rights of defendant on new trial.
36. Plaintiff recovering, to recover damages.
37. Mode of recovering such damages, by suggestion on the record.
38. Form thereof, service and proceedings.
39. Plea and defence of defendant.
40. Trial of issues and assessment of damages.
41. Facts to be established by plaintiff.
42. Set-off allowed of improvements, &c., by defendant.
43. Plaintiff not to recover for more than six years' use.
44. Mode of assessing damages on default, &c.
45. Proceedings to ascertain them.
46. Judgment on verdict or inquisition; its effect.
47. Proceedings to recover mesne profits, on death of plaintiff.
48. On recovery of dower, proceedings to ascertain it.
49. Costs of admeasurement, how paid.
50. Mortgages not to maintain ejectment.

"SECTION 1. The action of ejectment is retained, and may be brought in the cases and the manner heretofore accustomed, subject to the provisions hereinafter contained.

"§ 2. It may also be brought,

"1. In the same cases in which a writ of right may now be brought by law, to recover lands, tenements, or hereditaments; and by any person claiming an estate therein, in fee or for life, either as heir, devisee or purchaser.

"2. By any widow entitled to dower, or by a woman so entitled and her husband, after the expiration of six months from the time her right accrued, to recover her dower, of any lands, tenements or hereditaments.

"§ 3. No person can recover in ejectment, unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial.

"§ 4. If the premises, for which the action is brought, are actually occupied by any person, such actual occupant shall be named defendant in the declaration; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit.

"§ 5. It shall be commenced by the service of a declaration, in which the names of the real claimants shall be inserted as plaintiffs, and all the provisions of law concerning lessors of a plaintiff shall apply to such plaintiffs.

"§ 6. The use of fictitious names of plaintiffs or defendants, and of the names of any other than the real claimants, and the real defendants, and the statement of any lease or demise to the plaintiff, and of an ejectment by a casual or nominal ejector, are hereby abolished.

"§ 7. It shall be sufficient for the plaintiff to aver in his declaration, that on some day therein to be specified, and which shall be after his title accrued, he was possessed of the premises in question, describing them as hereinafter provided, and being so possessed thereof, that the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage, any nominal sum the plaintiff shall think proper to state.

"§ 8. In such declaration, the premises claimed, shall be described with convenient certainty, designating the number of the lot or township, if any, in which they shall be situated; if none, stating the names of the last occupants of lands adjoining the same, if any; if there be none, stating the natural boundaries, if any; and if none, describing such premises by metes and bounds; or in some other way, so that, from such description, possession of the premises claimed may be delivered.

"§ 9. If such plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in such declaration.

"§ 10. If the action be brought for the recovery of dower, the declaration shall state that the plaintiff was possessed of the one undivided third part of the premises, as her reasonable dower as widow of her husband, naming him. In every other case, the plaintiff shall state whether he claims in fee, or whether he claims for his own life, or the life of another, or for a term of years, specifying such lives or the duration of such term.

"§ 11. In any case, other than where the action shall be brought for the recovery of dower, the declaration may contain several counts, and several parties may be named as plaintiffs, jointly, in one count, and separately, in others.

"§ 12. A defendant in ejectment may, at any time before pleading, apply to the court, or to any judge thereof in vacation, to compel the attorney for the plaintiff to produce to such court or officer his authority for commencing the action in the name of any plaintiff therein.

"§ 13. Such application shall be accompanied by an affidavit of the defendant, that he has not been served with proof in any way, of the authority of the attorney to use the names of the plaintiffs stated in the declaration.

"§ 14. Upon such application, the court or officer shall grant an order requiring the production of such authority, and shall stay all proceedings in the action until the same be produced.

"§ 15. Any written request of such plaintiff, or his agent, to commence such action, or any written recognition of the authority of the attorney to commence the same, duly proved by the affidavit of such attorney, or other competent witness, shall be sufficient presumptive evidence of such authority.

"§ 16. If it shall appear, that previous to such application by any defendant, he was served with a copy of the affidavit of the plaintiff's attorney, showing his authority to bring such action, such application shall be dismissed, and such defendant shall be liable for the costs of resisting such application; the payment of which may be compelled by attachment, as in other cases, which may be issued upon proof of disobedience to the order of the court or officer directing the payment of such costs.

"§ 17. In all actions of ejectment brought to recover any right of dower in real estate, where the husband of the claimant did not die seised of the premises in which dower is claimed, the defendant may have the same right to interpose the plea of tender he had previous to the passage of the Revised Statutes, and whenever the said plea shall be pleaded, the parties shall be subject to the same rules as to the payment of costs, as they were previous to the Revised Statutes, and all the provisions of the Revised Statutes inconsistent with the provisions of this act, are hereby repealed. [1840, ch. 239.]

"§ 18. It shall not be necessary for the plaintiff to prove an actual entry under title, nor the actual receipt of any profits of the premises demanded; but it shall be sufficient for him to show a right to the possession of such premises, at the time of the commencement of the suit, as heir, devisee, purchaser, or otherwise.

"§ 19. It shall not be necessary, on the trial, for the defendant to confess, nor for the plaintiff to prove lease, entry and ouster, or either of them, except as provided in the next section; but this section shall not be construed to impair, nor in any way to affect, any of the rules of evidence now in force, in regard to the maintenance and defence of the action.

"§ 20. If the action be brought by one or more tenants in common, or joint tenants, against their co-tenants, the plaintiff, in addition to all other evidence which he may be bound to give, shall be required to prove, on the trial of the cause, that the defendant actually ousted such plaintiff, or did some other act amounting to a total denial of his right as such co-tenant.

"§ 21. If the action be brought against several defendants, and a joint possession of all be proved, the plaintiff shall be entitled to a verdict against all, whether they shall have pleaded separately or jointly.

"§ 22. When the action is against several defendants, if it appear on the trial, that any of them occupy distinct parcels in severalty, or jointly, and that other defendants possess other parcels in severalty, or jointly, the plaintiff shall elect at the trial against which he will proceed; which election shall be made before the testimony in the cause shall be deemed closed; and a verdict shall thereupon be rendered for the defendants not so proceeded against.

"§ 23. In the following cases, the verdict shall be rendered as follows:

"1. If it be shown on the trial, that all the plaintiffs have a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiffs generally:

"2. If it appear that one or more of the plaintiffs have a right to the possession of the premises, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant.

"3. If the verdict be for any plaintiff, and there be several defendants, the verdict shall be rendered against such of them as were in possession of the premises, or as claimed title thereto, at the commencement of the action:

"4. If the verdict be for all the premises claimed, as specified in the declaration, it shall in that respect be for such premises generally:

"5. If the verdict be for a part of the premises described in such declaration, the verdict shall particularly specify such part, as the same shall have been proved, with the same certainty hereinbefore required in the declaration, in the description of the premises claimed:

"6. If the verdict be for an undivided share or interest in the premises claimed, it shall specify such share or interest; and if for an undivided share in any part of the interest claimed, it shall specify such share, and shall describe such part of the premises as hereinbefore required:

"7. The verdict shall also specify the estate which shall have been established on the trial, by the plaintiff in whose favor it shall be rendered, whether such estate be in fee, for his own life, or for the life of another, stating such lives, or whether it be a term of years, and specifying the duration of such term.

"§ 24. If the right or title of the plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be entered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed; and that as to the premises claimed, the defendant go thereof without day.

"§ 25. The action of ejectment shall not be abated by the death of any plaintiff, or of one of several defendants, after issue and before verdict or judgment; but the same proceedings may be had as in other actions, to substitute the names of those who may succeed to the title of the plaintiff so dying, in which case, the issue shall be tried as between the original parties; and in case of the death of a defendant, the cause shall proceed against the other defendants.

"§ 26. In cases where no other provision is made, the judgment in the action, if the plaintiff prevail, shall be, that the plaintiff recover the possession of the premises, according to the verdict of the jury, if there was such verdict; or if the judgment be by default, according to the description thereof in the declaration, with costs to be taxed.

"§ 27. The plaintiff recovering judgment, shall be entitled to writ of possession, which shall be substantially in the following form:

"The People, &c., To the Sheriff, &c.

Whereas A. B., has lately, in our supreme court of judicature, [or, 'in the court of common pleas held in and for the county of ,' as the case may be,] by the judgment of the said court, recovered against C. D., one messuage, &c., [describing the premises recovered, with the like certainty as above provided,] which said premises have been, and are still unjustly withheld from the said A. B., by the said C. D., whereof he is convicted, as appears to us of record; and forasmuch as it is adjudged in the said court, that the said A. B., have execution upon his said judgment against the said C. D., according to the force, form and effect of his said recovery; therefore, we command you, that without delay, you deliver to the said A. B., possession of the said premises so recovered with the appurtenances; and that you certify to, &c., at, &c., on, &c., in what manner you shall have executed this writ. [If there be costs to be collected, the proper clause may be here inserted, or a separate execution may be issued therefor.]

"Witness, &c."

"§ 28. Upon a judgment against the plaintiff, or one or more plaintiffs, in cases where they shall be liable for costs, execution for the collection of the same, shall be issued as upon judgments in personal actions; and the proceedings by attachment for the collection of such costs, is hereby abolished.

"§ 29. Every judgment in the action of ejectment rendered upon a verdict, shall be conclusive as to the title established in such action, upon the party against whom the same is rendered, and against all persons claiming from, through or under such party, by title accruing after the commencement of such action, subject to the exceptions hereinafter contained.

"§ 30. The court in which such judgment shall be rendered, at any time within three years thereafter, upon the application of the party against whom the same was rendered, his heirs or assigns, and upon payment of all costs and damages recovered thereby, shall vacate such judgment and grant a new trial in such cause. And the court, upon subsequent application made within two years after the rendering of the second judgment in said cause, if satisfied that justice will be thereby promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment and grant another new trial. But no more than two new trials shall be granted under this section.

"§ 31. Every judgment in ejectment rendered by default, shall, from and after three years from the time of docketing the same, be conclusive upon the defendant, and upon all persons claiming from or through him by title accruing after the commencement of the action. But within five years after the docketing of such judgment, on the application of the defendant, his heirs or assigns, and upon payment of all costs and damages recovered thereby, the court may vacate such judgment and grant a new trial, if such court shall be satisfied that justice will be promoted, and the rights of the parties more satisfactorily ascertained and established.

"§ 32. But if the defendant in such action, at the time of the docketing of the judgment by default, be either,

"1. Within the age of twenty-one years: or,

"2. Insane: or,

"3. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence, for any term less than for life: or,

"A married woman:

"The time during which such disability shall continue, shall not be deemed any portion of the said three years; but any such person may bring an action for the recovery of such premises after that time, and within three years after such disability shall be removed, but not after that period.

"§ 33. If the person entitled to commence such action, shall die during the continuance of any disability specified in the preceding section, and no determination or judgment be had of or upon the title, right or action so to him accrued, his heirs may commence such action, after the time above limited for that purpose, and within three years after his death.

"§ 34. If the plaintiff shall have taken possession of the premises, by virtue of any recovery in ejectment, such possession shall not in any way be affected by the vacating of any judgment, as herein provided; and if the defendant recover in any new trial hereby authorized, he shall be entitled to a writ of possession, in the same manner as if he was plaintiff.

"§ 35. Upon any new trial granted as herein provided, the defendant may show any matters in bar of a recovery, which he might show to entitle him to the possession of the premises, if he were plaintiff in the action.

"§ 36. The plaintiff recovering judgment in ejectment in any of the cases in which such action may be maintained, shall also be entitled to recover damages against the defendant for the rents and profits of of the premises recovered. But if such action be brought for the recovery of the dower, the plaintiff shall be entitled to recover such damages, only in the cases and to the extent prescribed in the first chapter of the second part of the revised statutes.

"§ 37. Instead of the action of trespass for mesne profits heretofore used, the plaintiff seeking to recover such damages, shall, within one year after the docketing of the judgment, make and file a suggestion of such claim, which shall be entered with the proceedings thereon, upon the record of such judgment, or be attached thereto, as a continuation of the same.

"§ 38 Such suggestion shall be substantially in the same form as is now in use for a declaration in an action of assumpsit for use and occupation, as near as may be; and it shall be served on the defendant in the same manner hereinbefore prescribed respecting the service of a declaration in ejectment; and a rule to plead thereto shall be entered, and notice thereof given, in the same manner as upon declarations in personal actions.

"§ 39. The defendant may plead the general issue of non-assumpsit, and under such plea, may give notice of, or may plead specially, any matters in bar of such claim, except such as were or might have been controverted in such action of ejectment; but he may plead or give notice of a recovery by such defendant, or any other person, of the same premises, or of part thereof, subsequent to the verdict in such action of ejectment, in bar or in mitigation of the damages claimed by the plaintiff.

"§ 40. If any issue of fact be joined on such suggestion, it shall be tried, as in other cases: and if such issue be found for the plaintiff, the same jury shall assess his damages to the amount of the *mesne* pro-

fits received by the defendant since he entered into possession of the premises, subject to the restrictions hereinafter contained.

"§ 41. On the trial of such issue, the plaintiff shall be required to establish, and the defendant may controvert, the time when such defendant entered into the possession of the premises; the time during which he enjoyed the *mesne* profits thereof, and the value of such profits; and the record of the recovery in the action of ejectment, shall not be evidence of such time.

"§ 42. On such trial the defendant shall have the same right to set off permanent improvements made on the premises, to the amount of the plaintiff's claim, as is now allowed by law. And in estimating the plaintiff's damages, the value of the use by the defendant of any improvements made by him, shall not be allowed to the plaintiff.

"§ 43. The plaintiff shall not be entitled to recover the rents and profits of the land so recovered, for any longer term than six years.

"§ 44. If no issue of fact be joined on such suggestion, or if judgment thereon be rendered against the defendant, by default on demurrer or otherwise, a writ of inquiry, to assess the value of such *mesne* profits, shall be issued, of the execution of which the same notice shall be given to the defendant, or his attorney, as in other cases.

"§ 45. Upon the execution of such writ, the plaintiff shall be required to establish the same matters hereinbefore required, in the case of an issue being joined, and the defendant may in like manner, controvert the same, and make any set-off to which he shall be entitled: and the jury shall assess the damages in the same manner. The same proceedings shall be had on such writ, and it shall be returned, as in other cases, with the inquisition taken thereon.

"§ 46. Upon such inquisition, or upon the verdict of the jury in the case of an issue being joined, the court shall render judgment as in actions of assumpsit, for use and occupation, which shall have the like effect in all respects.

"§ 47. If the plaintiff in ejectment shall have died after issue joined or judgment therein, his personal representatives may enter a suggestion of such death, of the granting letters testamentary or of administration to them, and may suggest their claim to the mesne profits of the premises recovered, in the same manner and with the like effect, as the deceased, and the same proceedings, in all respects shall be had thereon.

"§ 48. If the action be brought to recover the dower of any widow, which shall not have been admeasured to her before the commence-

ment of such action, instead of a writ of possession being issued, such plaintiff shall proceed to have her dower assigned to her in manner following:

"1. Upon the filing of the record of judgment, the court, upon the motion of the plaintiff, shall appoint three reputable and disinterested freeholders commissioners, for the purpose of making admeasurement of the dower of the plaintiff out of the lands described in the record; and the commissioners so appointed shall proceed in like manner, possess the like powers, and be subject to the like obligations and control, as commissioners appointed pursuant to the seventh title of the eighth chapter of this act:

"2. The report of the commissioners may be appealed from by any party to the action, within the same time, and the like proceedings shall be had thereupon as are prescribed in the said seventh title of the said eighth chapter:

"3. Upon the confirmation of the report of the commissioners, a writ of possession shall be issued to the sheriff of the proper county, describing the premises assigned for the dower, and commanding the sheriff to put the defendant in possession thereof.

"§ 49. The costs and expenses incurred in such admeasurement of dower, shall be subject to the provisions contained in the seventh title of the eighth chapter of this act.

"§ 50. No action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises."

The following provisions are peculiar to actions of ejectment on behalf of the state:

"Revised Statutes, part 1, chap. 8, tit. 5, secs. 10, 11, and 12, (vol. 1, p. 399.)

"§ 10. Every action of ejectment already commenced, or hereafter to be commenced, in the name of the people of this state, either by the attorney-general, or with his consent, shall and may be sustained and prosecuted to judgment and execution, in the Supreme Court of this state, in like manner as if such action had been commenced by an individual; but no such suit shall be commenced for the benefit of an individual without the consent of the attorney-general.

"§ 11. No such consent shall be given by the attorney-general unless the individual desirous to prosecute such suit shall give security to the defendant for the payment of the taxable costs, in case the suit shall be determined in favor of the defendant. The security shall be filed in the office of one of the clerks of the Supreme Court, and be approved of by the clerk in whose office it shall be filed.

"§ 12. Whenever an action of ejectment shall be brought for the purpose of escheating lands, or otherwise for the benefit of the people of this state, by the attorney general, or by the direction of the commissioners of the land office, and the nominal plaintiff shall fail therein for any cause, or the action shall be discontinued, the defendant shall be entitled to costs in the same manner, and to the same extent, as if such action had been brought by an individual; which costs, upon being duly taxed, shall be paid out of the treasury of this state, on the warrant of the comptroller."

Revised Statutes, part 1, chap. 9, tit. 12, (vol. 1, pp 558, 559,) as amended by act of 53d session, chap. 320. (Laws of 1830, pp. 402, 403.)

TITLE XII.

OF ESCHEATS.

SEC. 1. Attorney-general to bring ejectment for the recovery of escheated lands.
2. Notice of such suits, how published.
3. Contents of such notice.
4. Special provisions as to place of trial.
5. When part of a lot is escheated residue may be sold.
6. Effects of grants in such cases.
7. Residue to be appraised, &c.
8. Attorney-general to report recoveries to the commissioners of the land office.

"SEC. 1. Whenever the attorney-general shall be informed, or have reason to suspect that the people of this state have title to any real estate by escheat, he will cause an action of ejectment to be brought for the recovery thereof, in which action the proceedings shall, in all respects, be similar to those usually had in other actions of ejectment,(a) 'except that where the premises for which the action is brought are not occupied by any person, and no person shall be known as claiming title thereto, the Supreme Court, on affidavit of such facts, may allow the suit to be brought as against claimants unknown; and the declaration and notice shall be served by publishing the same in such manner and for such time as the court shall direct; and if no person shall appear in the said action, the default of the claimants unknown shall be entered, and judgment be rendered thereon.'

"§ 2. No such action shall be brought to trial, when the lands are occupied, nor shall judgment be taken therein, when such lands are vacant, until three months' notice shall have been published by order of the commissioners of the land-office, in the state paper, and also in one public newspaper printed in the city of New York, and in one paper printed in the county where the lands shall be situated, or in an adjoining county, when there is no paper printed in the county.(a)

(a) Laws of 1818, p. 293, § 2; 1820, p. 248, § 5.

"§ 3. Such notice shall state the proceedings which have been had, for the recovery of the said lands, and give a description of the same.(*a*)

"§ 4. After any lands, recovered in any action against claimants unknown, shall have been sold and conveyed, under the direction of the commissioners of the land office, the judgment recovered in such action shall be conclusive upon the title of such lands, and shall bar all persons claiming or to claim the same or any part thereof; except such claimants as shall, within five years after the docketing of such judgment, commence their action for the recovery of such lands, subject to the like exceptions in favor of persons within age, insane, or imprisoned, and of married women, as are contained in the statutes of this state, regulating the time of commencing actions relating to real property.

"§ 5. Any such action of ejectment, which has been, or may hereafter be commenced, to recover lands situated in the military tract, in the several counties of Cortland, Tomkins, Seneca, and Oswego, may be tried in either of the counties of Onondaga or Cayuga, whenever the attorney general, and the attorney for any defendant, shall agree thereto, in writing, which agreement shall be filed in the office of one of the clerks of the Supreme Court; and every trial of any such action, pursuant to such agreement, shall have the like effect and validity as if such trial were had in the county where such lands are situated.(*b*)

"§ 6. In all such cases where proceedings have been or shall hereafter be had, whereby any part of any lot on the tract set apart for military bounty lands, have been or shall be, by judgment of law, escheated to the people of this state, on account of the death of the original patentee, without heirs, and before a conveyance by such patentee, or for any other cause, which shall in like manner extend to the title of the whole of such lot, the whole and every part of such lot included in the original patent of the same, and which, at the time of such escheat, was not in the actual possession of any such person or persons under color of title, may be sold by the commissioners of the land office, and granted in the manner provided by law for the sale of the unappropriated lands belonging to this state.(*c*)

"§ 7. Any such grant shall be presumptive evidence of the title of the people of this state, and of the grantee therein named, but may be rebutted by proof that the premises contained in such grant had not in fact escheated to this state.(*c*)

(*a*) Laws of 1818, p. 293, § 2; 1820, p. 248, § 5.
(*b*) Laws of 1820, p. 249, § 8.
(*c*) Laws of 1828, p. 429, 430.

"§ 8. Whenever such proceedings shall have been had, as are mentioned in the fifth section of this title, and a part of a military lot shall have been escheated to the people of this state, for any reason which extends to the title of the whole lot, the commissioners of the land office may cause the value of the remaining parts of said lot to be appraised as provided in the "Act for the relief of the occupants of military lands which have escheated to the people of this state," passed April, 13th, 1819, and the acts amending the same, notwithstanding the necessary proceedings may not have been had to perfect the title of the people to the same; and the occupants of such parts shall thereupon be entitled to all the privileges and benefits conferred by the said act, and the several acts amending the same.(*a*)

"§ 9. The attorney-general shall, from time to time, make report to the commissioners of the land office, of all escheated lands recovered by him, in any action of ejectment brought under this title."

Revised Statutes, part 1, chap. 9, title 13, § 1, (vol. 1, p. 561.)

TITLE XIII.

"§ 1. Real estates forfeited to the people of this state, upon any conviction or outlawry for treason, may be recovered in the same manner as escheated lands; and for that purpose, all the provisions of the preceding title, except those contained in the fourth, fifth, sixth and seventh [and eighth] sections, shall be construed to extend to the recovery of estates so forfeited."(*b*)

PART 3, CH. 5, TIT. II.

PROCEEDINGS TO COMPEL THE DETERMINATION OF CLAIMS TO REAL PROPERTY, IN CERTAIN CASES.

SEC. 1. Who entitled to proceed under this title.
2. Notice to be served on claimant; its contents.
3. Upon what persons and how to be served.
4. Rule for appearance of claimant, how to be entered.
5. Claimant to appear by serving notice.
6. Judgment for want of appearance. &c.; its effects.
7. Plea on bar of certain matters; judgment thereon, &c.
8. Disclaimer of right, costs thereon and effect of.

(*a*) Laws of 1828, p. 429, 430.
(*b*) 1 R. L. 382, § 6.

9. If title claimed, to declare in ejectment.
10. What to be deemed pleading, within the rule.
11. Rule upon filing declaration in ejectment.
12. Pleadings and proceedings thereon.
13. Right of possession not required in certain cases, &c.
14. Effect of judgment in such actions.
15. Writ of possession and mesne profits.
16. Exception as to reversions, &c.
17, 18, and 19. Proceedings under this title against non-residents having agents.
20. In what cases rule to appear and plead, may be had.

"§ 1. Where any person singly, or he and those whose estate he has, shall have been for three years in the actual possession of any lands or tenements, claiming the same in fee or for life, he may compel a determination upon any claim which any other person may make to any estate in fee or for life, in possession, reversion or remainder, to such lands and tenements, in the manner and by the proceedings herein after specified.

"§ 2. He shall serve a notice, subscribed with his name and place of residence, on such claimant, stating,

"1. His right to the premises demanded in a brief manner, and whether his estate therein is in fee or for life, and whether he holds the same as heir, devisee or purchaser, with the source or means by which his right immediately accrued to him.

"2. The premises claimed, with the same certainty as herein before required in a declaration in ejectment:

"3. That such premises then are, and for the three years preceding such notice have been, in his actual possession, or in the actual possession of himself and those from whom he derives his title; and,

"4. That the person to whom such notice is directed, unjustly claims title to such premises, and that unless such person appear in the supreme court within the time, and assert his claim, in the manner provided by law, he and all persons claiming under him, will be forever barred from all claim to any estate or inheritance or freehold, in possession, reversion or remainder, to the premises described in such notice.

"§ 3. Such notice can be directed to and served, only, upon a person being at the time, of full age and not insane, nor imprisoned on any criminal charge or conviction, and not being a married woman; and it shall be served by delivering a copy thereof personally to the individual to whom it is directed.

"§ 4. Upon any day in any term of the supreme court after the service of such notice, the person who caused the same to be served, on filing a copy of such notice, with an affidavit of the due service thereof, as herein required, may enter a rule of course, requiring the person on whom such notice was served to appear and plead thereto, within forty days after the entry of such rule.

"§ 5. Such appearance shall be made by serving notice thereof on the person in whose behalf such rule was entered, or on his attorney.

"§ 6. If such person shall not appear and plead, within the time limited in the rule, the court shall direct his default to be entered, and judgment shall be rendered upon such default, in like manner, and with the like effect, as if such person had appeared and disclaimed, as hereinafter provided; except that no costs shall be adjudged against either party.

"§ 7. Such persons may plead in bar of all further proceedings, that neither the party serving such notice, nor he and those whose estate he has, have been in the actual possession of the premises claimed, for three whole years before the service of such notice. And if judgment be given in favor of such plea, all further proceedings shall be barred, and the person so pleading shall recover his costs. If judgment be given against such plea, the party pleading may be required by rule, to be entered as of course, to plead to the title within twenty days after service of a notice of such rule; and, in case he shall omit so to plead within that time, the like judgment shall be had against him as if he had disclaimed, as provided in the next section.

"§ 8. Such person may, by plea, disclaim all right, title, and claim to any estate of inheritance or of freehold in the premises described in the notice, and which shall also be described in such plea; in which case, judgment of discontinuance shall be entered with costs, to him; but he, and all persons claiming under him, by title accruing subsequently to the service of the notice hereinbefore provided, shall be forever barred from all claim to any estate of inheritance or freehold in the said premises.

"§ 9. If such person claims title, in fee or for life, in possession, reversion, or remainder, he shall declare against the person serving such notice, as in an action of ejectment, and shall thereupon become plaintiff in such action.

"§ 10. Such declaration, or any plea hereinbefore allowed, shall be deemed a pleading within the rule requiring an appearance and plea, as herein before provided.

"§ 11. If a declaration in ejectment be filed and served as herein provided, the plaintiff therein may enter a rule requiring the defendant to plead thereto within twenty days after service thereof, in the same manner and with the like effect as in personal actions.

"§ 12. Such defendant shall demur or plead thereto in the same manner as hereinbefore provided, and the like proceedings in all respects shall be had, and with the like effect, except as herein otherwise provided.

"§ 13. If such plaintiff claim the premises in question by virtue of any estate, remainder, or reversion, he shall not be required to establish an immediate right to the possession of such premises; but, if a verdict be found in his favor, the time when he will be entitled to such possession, shall be specified in such verdict.

"§ 14. In such action of ejectment, a judgment obtained by either party shall be conclusive against the other party, as to the title established in such action; and also against all persons claiming under such party by title accruing subsequently to the service of the notice herein before provided.

"§ 15. If the plaintiff recover, and be entitled to the immediate possession of the premises, he shall be entitled to a writ of possession, as herein before provided, and may recover the value of the use and occupation of the premises, by a suggestion on the record, in the same manner as other plaintiffs in ejectment.

"§ 16. If such plaintiff recover upon any title in reversion or remainder, by virtue of which he shall not, at the time of such recovery, be entitled to the immediate possession of the premises in controversy, no writ of possession shall issue upon such judgment, nor shall any claim to damages be suggested upon the record; but, whenever such plaintiff, or those claiming under him, shall be entitled to such possession, an action of ejectment may be brought for the recovery thereof, as in other cases.

"§ 17. When the person intended to be proceeded against, under the provisions of this title, shall not be a resident of this state, and shall not have been personally served with the notice specified in the second section of this title, the party seeking to avail himself of the provisions of this title may present a petition to the Supreme Court, setting forth such facts, together with a copy of such notice; which petition, together with the facts stated in such notice, shall be verified by his affidavit.

"§ 18. Such affidavit shall also set forth, whether the party proceeded against has any agent or agents within this state, and the names and residence of such agents, if any are known.

"§ 19. The court may thereupon, in its discretion, make order for the service of such notice upon such agent or agents.

"§ 20. Upon due proof of the service of such notice in the manner directed, such court, upon the application of the party giving such notice, if no good cause to the contrary appear, and if the party proceeded against shall not have appeared, pursuant to the provisions of this title, may direct a rule to appear and plead, as prescribed in the fourth sec-

tion of this title; and thereafter such proceedings may be had, and with the like effect, as in other cases.

"§ 21. All the provisions of this title are extended to estates for a term of not less than ten years, so far as the same are applicable thereto."

MAINE.

(*Revised Statutes of Maine, tit.* 10, *ch.* 145.)

OF REAL ACTIONS.

Sec. 1. All writs of right and of formedon, and all writs of entry, except that which is provided for in this chapter, shall be abolished from and after the first day of April, in the year one thousand eight hundred and forty-three, except as is provided in the following sections.

Sec. 2. If any person, who, on the said first day of April, shall be entitled to maintain any of the said actions which are to be abolished on that day, shall be within the age of twenty-one years, a married woman, insane, imprisoned or without the limits of the United States, the action may be brought at any time within five years after the disability shall cease, or after the death of the person disabled; provided, that no such action shall be maintained, after it would have been barred by the statutes of limitation in force, at, and immediately before the time when this chapter shall take effect.

Sec. 3. Any estate of freehold, whether in fee simple, fee tail, or for life, may be recovered by a writ of entry; and such writ, and also the writ in an action of dower, shall be served, not only in the usual manner by attachment and summons, or by copy of the writ upon the defendant, but if the defendant be not tenant in possession, by a delivery, by the officer, to the tenant, or by leaving at his last and usual place of abode, an attested copy of the writ; and, if the defendant be not an inhabitant of this state, the service on the tenant shall be sufficient notice to the defendant, or the court may order such further notice, as they may deem proper.

Sec. 4. The demandant shall declare on his own seizin, within twenty years then last past, without naming any particular day, and shall allege a dissezin by the tenant; but need not aver a taking of the profits.

Sec. 5. He shall set forth the estate he claims in the premises, whether in fee simple, fee tail, or for life; and, if for the latter, then whether for his own life, or the life of another; but shall not be required in any case to state in the writ, the origin of his title, or the deduction of it to himself; but, on the application of the tenant, the court may direct the demandant to file in the case of an informal statement of the title on which he relies, and the origin of it.

Sec. 6. The demandant shall not be required to prove an actual entry under his title, but proof that he is entitled to such an estate in the premises, as he claims, as heir, devisee, purchaser, or otherwise, and also that he has a right of entry therein, shall be deemed sufficient proof of the seizin alleged in the declaration.

Sec. 7. No such action shall be maintained, unless, at the time of commencing the action, the demandant had such right of entry into the premises.

Sec. 8. No descent, or discontinuance of any kind, or however occasioned, which may hereafter occur, shall take away or defeat any right of entry for the recovery of real estate.

Sec. 9. Every person alleged to be in possession of the demanded premises in such writ of entry, claiming any freehold therein, may be considered as a disseizor, for the purpose of trying the right, whatever may be the manner of his original entry on the premises; but, by a brief statement under the general issue, the defendant may show that he was not in possession of the premises demanded, when the action was commenced, and disclaim any right, title, or interest therein; and, proof of such fact shall defeat the action; and if he was in possession of, or claiming only a part of the demanded premises, when the action was commenced, he shall describe such part in a statement, signed by him or his attorney, and filed in the case, and may disclaim the residue as aforesaid; and if, on trial, the facts contained in such statement shall be proved to be true, the demandant shall recover judgment for no more than the part so described therein.

Sec. 10. If the person in possession have actually ousted the demandant, or withheld the possession of the premises, he may, at the election of the demandant, be considered a disseizor for the purpose of trying the right, though he should claim therein an estate less than freehold.

Sec. 11. If the trial upon such writ of entry on the general issue, if the demandant shall prove that he is entitled to such estate in the premises as he has alleged, and had a right of entry into the same on the day when the action was commenced, he shall recover the premises, unless the tenant in possession shall prove a better title in himself.

Sec. 12. Persons claiming, as tenants in common, joint tenants, or coparceners, may all join, or any two or more of them may join, in a suit for recovery of lands; or any one may sue alone for his own particular share.

Sec. 13. The demandant may, in all cases, recover any specific part of the premises, or any undivided portion thereof, to which he shall prove a title, though such part or portion may be less than is demanded.

Sec. 14. When a demandant recovers judgment in a writ of entry he shall also be entitled to recover, in the same action, damages against the tenant for the rents and profits of the premises from the time when the demandant's title accrued, subject to the limitations hereinafter contained; and he shall also recover damages for any destruction or waste

of the buildings or other property, for which the tenant is by law answerable.

Sec. 15. The rents and profits, for which the tenant shall be liable, shall be the clear annual value of the premises for the time, during which he was in possession thereof, after deducting all lawful taxes and assessments on the premises, that shall have been paid by the tenant, and all the necessary and ordinary expenses of cultivating the land, or collecting the rents, profits or income of the premises.

Sec. 16. In estimating the rents and profits, the value of the use by the tenant of any improvements made by himself, or those under whom he claims, shall not be computed nor allowed to the demandant.

Sec. 17. The tenant shall never be liable for the rents and profits, for any longer time than six years, nor for any waste or other damage committed before that time, unless the rents and profits are allowed by way of set-off to his claim for improvements, as hereinafter provided.

Sec. 18. Nothing, contained in this chapter, shall prevent the demandant from maintaining an action for mesne profits, or for damage done to the premises, against any person, except the tenant in a writ of entry, who may have had possession of the premises, or who may be otherwise liable to such action.

Sec. 19. No action, wherein the possession of land is, or may be demanded, shall, at any stage of its progress, after having been entered in court, be abated by the death or intermarriage of either party thereto; but the court, wherein the same may be pending, shall proceed to try and determine such action, after such notice, as the court may order, shall have been duly served upon the legal representatives of any party deceased, and all others interested in his estate, as heirs, or upon the husband of any party intermarried, either personally, or by publication in some newspaper.

Sec. 20. If, in such cases, any heir of a deceased party is a minor, the court shall order notice to the guardian, and shall have power to appoint a guardian *ad litem*, if necessary, and the court shall also direct all necessary amendments to be made in the forms of proceeding.

Sec. 21. Where judgment shall be for the demandant in any such case, the court may order one or more writs of possession to issue, as may be necessary; and where such judgment shall be against the representative or heirs of any deceased party, a writ of possession may be issued against all such, as may have been notified according to the provisions of the nineteenth and twentieth sections, whether they have appeared and defended said suit or not; and such judgment shall be conclusive against all, who have appeared and defended said suit, or who have been notified to appear as aforesaid.

Sec. 22. In all such cases, full costs shall be allowed to the prevailing party, and the court may order one or more executions to be issued, therefor, as law and justice may require, either against the goods and estate of a deceased party in the hands of his executor or administrator, or otherwise, according to the legal rights and liabilities of the parties,

and may further order any such stay of execution, as the situation of the estate may require.

Sec. 23. When the demanded premises have been in the actual possession of the tenant, or those under whom he claims, for six successive years or more, before commencement of the action, such tenant shall be allowed a compensation for the value of any buildings and improvements on the premises, made by him or those under whom he claims, to be ascertained and adjusted in the manner hereinafter provided.

Sec. 24. In such action, the premises demanded shall be so defined and described in the declaration, that the defendant may know, with reasonable certainty, what lands and tenements are intended; otherwise, the court, before which the action is pending, may direct a nonsuit. And, if the tenant or the person, under which he claims, has been in possession of a tract of land, lying in one body, for six years or more before the commencement of the action, and only a part of such tract is demanded, and the tenant alleges that the demandant has as good title to recover the whole tract, as he has to recover the tract demanded, the tenant may request the jury to ascertain, and by their verdict, to decide that fact; and, if they find that the demandant has as good a title to demand the whole tract, as the part demanded, they shall proceed no further; but, on such verdict, the court shall enter judgment, that the writ abate, unless the declaration shall be so amended as to include the whole tract; which amendment the court may allow, without costs.

Sec. 25. If the tenant shall consent that the demandant may recover a specified part of the demanded premises, and enter notice thereof on record, in open court, then, by consent of the demandant, judgment may be rendered in favor of him for such part, and for the defendants for the residue; and, if the demandant shall not consent to such offer, and shall not recover for any other part of the premises, he shall not recover any costs; but the defendant shall recover costs from the time of such rejected offer.

Sec. 26. The tenant shall enjoy the benefit of the provisions in the following sections, as to the increased value of the premises, as well when the cause is determined by the court in favor of the demandant upon demurrer, or default, as when by verdict.

Sec. 27. The tenant may file a claim in writing to compensation for buildings and improvements on the premises, and a request for an estimation, by the jury, of the increased value of the premises by reason thereof; and the demandant may file a request in writing, that the jury would also estimate, what would have been the value of the premises, at the time of trial, provided no buildings had been erected, or improvements made, or waste committed; both which estimates it shall be their duty to make, and, in their verdict, state to court.

Sec. 28. If, after such verdict has been given, the demandant shall, at the same term of the court, or at a subsequent term, if the cause should be continued, make his election on record to abandon the premises to the tenant, at the value estimated by the jury, then judgment shall be rendered against the tenant, for the sum so estimated by the jury, and costs.

Sec. 29. At the end of one year, execution may issue for such sum, with one year's interest thereon, and costs, unless the tenant shall then have deposited with the clerk of the court, or in his office, for the demandant's use, one year's interest of said sum, and one-third part of said principal sum, and all the costs, if taxed and filed, in which case, no execution shall issue at the time.

Sec. 30. If, within two years after the rendition of judgment, the tenant shall pay one year's interest on the balance of the judgment due, and one third part of the original judgment, then execution shall be further stayed; otherwise, it may issue for two-third parts of the original amount of the judgment, and interest thereon.

Sec. 31. If the tenant shall, within three years after the rendition of judgment, pay into the clerk's office the remaining third part and interest thereon, having made the several payments aforesaid, then the execution shall never issue; otherwise, it may, for the third part aforesaid and one year's interest thereon; and the premises shall be held bound as security for the amount of the judgment, liable to be taken in execution, in whole or in part satisfaction of said sum, or any unpaid part of the same, and the interest, until sixty days after an execution might have issued as aforesaid, notwithstanding any intermediate conveyance, attachment or service upon execution.

Sec. 32. Such execution may be extended on said land, or any part of it, and the same may be set off on execution, upon appraisement according to law; or the same may be sold on the execution, in the same manner, as an equity of redemption may be sold; and, in either case, subject to the right of redemption, as in those cases.

Sec. 33. Should the tenant or his heirs be evicted from the land, abandoned to him as aforesaid, by a better title of any claimant, and, if such tenant shall have given notice to the demandant or his heirs, to aid him in the defence of such claimant's action, the tenant, his executors or administrators, may recover back the money he shall have paid, with lawful interest, of said demandant or his representatives; but, if no such notice was given, then the tenant, in an action brought against the original demandant, to recover back the price paid for the premises, may show that he was evicted by force of a title better than that of the original demandant.

Sec. 34. When the demandant shall not elect to abandon the premises to the tenant, in the manner stated in this chapter, no writ of possession shall issue on the judgment rendered on the verdict, nor any new action be sustained for the land, unless the demandant shall, within one year from the rendition thereof, have paid into the clerk's office of the same court, or to such person as the court may appoint, for the use of the tenant, such sums as shall have been assessed for the buildings and improvements as aforesaid, with all interest thereon

Sec. 35. Nothing, contained in this chapter concerning rents and profits, or the estimate and allowance of the value of the buildings and improvements, shall be construed to extend to any action between a mortgagor and mortgagee, his heirs or assigns; or to any case where the ten-

ant, or the person under whom he claims, entered into possession of the premises and occupied under contract with the owner, which was known to the tenant, when he entered.

Sec. 36. No tenant, after judgment has been entered against him, for the appraised value of the premises, shall unnecessarily cut wood or take away any timber, or make any strip or waste on the land, till the amount of such judgment shall have been satisfied.

Sec. 37. Whenever the parties agree, that the value of the buildings and improvements on the land demanded, and the value of the land shall be ascertained by persons, named on the record for that purpose, their estimates, as reported by them and recorded shall, for all the purposes of this chapter, be deemed equal in its effect, as the verdict of a jury.

Sec. 38. Whenever the tenant, in any stage of such an action, shall, in open court, file a statement, in which he shall name the sum at which he consents that the buildings and improvements made on said land, and also the value of the demanded premises should be estimated, then, if the demandant shall consent to the same, judgment shall be rendered, according to such consent of parties, in like manner as if said sums had been found by verdict; but, if the demandant shall not so consent, and the jury shall not reduce the value of the buildings and improvements below the sum offered, nor increase the value of the premises above the sum offered, he shall not recover costs arising after such offer, but the tenant shall recover his costs arising after such offer, and have a separate judgment and execution therefor, subject to the provisions of the following section.

Sec. 39. In all cases, where the demandant does not abandon the premises to the tenant, the court may, on the written application of either party, during the term when judgment is entered, order the costs, recovered by the defendant, to be set off against the appraised value of the buildings and improvements on the land; a record of which order shall be made, and the court shall thereupon enter judgment, as shall be proper, according as the balance and its amount may be in favor of one party, or the other.

Sec. 40. No person shall be allowed to sit as a juror in the trial of a cause, when the value of buildings and improvements made on the demanded premises, and the value of the premises, are to be estimated as aforesaid, who, as proprietor or occupant, shall be interested in a similar question.

Sec. 41. The expiration of a year, after the rendition of judgment, shall not prevent the issuing of execution or writ of possession, in the cases mentioned in the twenty-ninth, thirtieth and thirty-first sections of this chapter; but it may be taken out at any time, within three months after any default of payment by the tenant.

Sec. 42. A possession and improvement of land by a tenant shall be deemed within the provisions of this chapter, though such land be not surrounded wholly by a fence, or rendered inaccessible by other obstructions, if such possession and improvement shall have been open,

notorious and exclusive, and comporting with the usual management and improvement of a farm by its owner, and though a portion of it may be woodland and uncultivated.

Sec. 43. If, after judgment has been rendered for the demandant in a writ of entry, either party die before a writ of possession is executed, or the cause otherwise disposed of, according to the foregoing provisions, any money, payable by the tenant, may be paid by him, his executors, or administrators, or by any person, who is entitled to the estate under him to the demandant, or his executors or administrators, with the like effect, as if both parties were living.

Sec. 44. The writ of possession, whenever issuable in such case, shall be issued in the name of the original demandant against the original tenant, though either of them or both be dead; and, when executed, it shall enure to the use and benefit of the demandant, or whoever is then entitled to the premises under him, in like manner, as if it had been executed in the lifetime of the parties.

Sec. 45. Either party may have a view, by the jury, of the place in question, if the court shall be of opinion that such view is necessary to a just decision; provided, that the party moving for the same, shall advance such sum to the jury as the court shall order, to be taxed against the adverse party, if the cause be decided against him on the merits, or through his default.

Sec. 46. If the demandant in a writ of entry shall claim an estate for life only, in the premises, and, if he shall pay any sum allowed to the tenant for improvements, he, or his executors or administrators, at the termination of his estate, shall be entitled to receive of the remainderman or reversioner, the value of such improvements as they then exist; and shall have a lien therefor on the premises in like manner as if they had been mortgaged for payment thereof; and he may keep possession thereof accordingly, till the same be paid; and, if the parties cannot agree on the then existing value, it may be settled in the same manner as in case of the redemption of mortgaged property.

Sec. 47. When any person shall make entry into lands or tenements, of which the tenant, then in possession, or those under whom he claims, have been in actual possession for the term of six years or more, before such entry made upon him or them, against his or their consent, and shall withhold from such tenant the possession thereof, such tenant shall have a right to recover of him so entering, or of his executors or administrators, in an action of assumpsit for money laid out and expended, the increased value of the premises, by virtue of the buildings and improvements, made by the tenant, or those under whom he claims.

Sec. 48. Such right and value shall be ascertained by the same principles as regulate such right and value under the provisions of this chapter.

Sec. 49. All real actions, which shall be pending in court, or duly commenced, at the time this chapter shall become a law, shall proceed and be conducted to final judgment or other final disposal, in like manner, as if this chapter had never been enacted.

VERMONT.

(*Rev. Sts. of Vermont, tit.* 13, *ch.* 38.)

EJECTMENT.

Sec. 1. Any person having claim to the seisin or possession of lands, tenements or hereditaments, shall have an action by writ of ejectment, according to the nature of the case, as nearly as may be, according to the form prescribed by law, which action shall, in all cases, be brought as well against the landlord, if any there be, as against the tenant in possession of the premises, and if otherwise brought, the same shall, on motion, be abated.

Sec. 2. The judgment recovered in an action of ejectment shall, while remaining in force, be conclusive against all the parties to such action, their heirs and assigns.

Sec. 3. If the plaintiff shall neglect to join the landlord, if any there be, with the tenant in such action, or shall, by collusion with the tenant, recover judgment against him for the seisin of any lands, such landlord shall not be prejudiced thereby, but shall, in any trial thereafter to be had of his right to such lands against the person so recovering as aforesaid, or any person deriving claim from him, be taken and holden to have the prior possession.

Sec. 4. In every action of ejectment, if judgment be rendered for the plaintiff, he shall recover as well his damages as the seisin and possession of the premises.

Sec. 5. The writ, in the action of ejectment, shall not abate because all the tenants are not sued, but those on whom service is made shall answer for such part of the premises only as they shall distinguish and set forth in their plea, and disclaim the remainder, and if any defendant shall disclaim the whole, he shall recover his costs, unless the plaintiff shall prove such defendant in possession of all or part of the premises demanded at the commencement of the action.

Sec. 6. On the trial in the action of ejectment the plaintiff shall recover on the merits, according to his right.

Sec. 7. If, after judgment in an action of ejectment in favor of the plaintiff, it shall appear to the court that the plaintiff claims title to the premises by virtue of any deed of mortgage, or bargain and sale with defeasance, the condition of which has not been performed, such court shall, on application of the defendant in such action, order stay of execution thereon.

Sec. 8. The court shall then ascertain the sum equitably due to the plaintiff, on such mortgage or deed with defeasance, at the time such judgment is rendered, including the costs of suit, and shall further order, that if the defendant or his representative shall pay or cause to be paid the amount then due the plaintiff, with the legal interest thereon, together with the clerk's fees, to the clerk of such court, by a time to

be limited by the court, not exceeding one year from the rendition of the judgment, then such judgment to be vacated.

Sec. 9. If the amount secured by such mortgage or deed with defeasance was made payable by instalments, a part of which shall not be due at the time the judgment is rendered, such court may order and decree a redemption, at any future period or periods, by instalments or otherwise, as to the court shall appear just and equitable, not more than one year after the last instalment shall become due.

Sec. 10. If the defendant or his representative shall pay or cause to be paid to the clerk of such court, within the time limited by the court, the sums so ordered to be paid, the clerk shall receive the same and deliver to the person making such payment a certificate thereof, which certificate, being recorded in the office where by law a deed of such premises is required to be recorded, shall forever defeat such mortgage or deed with defeasance, and when the plaintiff or his attorney shall receive such sum of the clerk, he shall subscribe a receipt therefor upon the records of the court.

Sec. 11. If the defendant or his representative shall not pay, or cause to be paid, any sum so ordered to be paid, as aforesaid, with the interest and fees, by the time limited by the court, as aforesaid, the plaintiff shall have his writ of possession for the premises recovered, and for his damages and costs, to be issued by the clerk of such court, and shall hold such premises to himself, his heirs and assigns, discharged from all right and equity of redemption.

Sec. 12. Every mortgagor shall, until condition broken, be deemed to have, as against the mortgagee, the legal right of possession to the mortgaged premises, unless it shall be otherwise clearly stipulated in the mortgage deed.

Sec. 13. Tenants in common of any lands may join in any action which concerns their common interest in any such land.

Sec. 14. In actions of ejectment for non-payment of rent, the plaintiff shall not be required to prove a demand of the rent in arrear, or a re-entry on the premises, but shall recover judgment in the same manner as if the rent in arrear had been legally demanded and re-entry made; but if the defendant in any such action, at any time before final judgment, shall pay into court the rent in arrear, with interest and the costs of suit, such action shall be discontinued.

Sec. 15. After final judgment, in an action of ejectment, in favor of the plaintiff, if the defendant has purchased the lands recovered in such action, or taken a lease thereof, or those under whom he holds have purchased a title to such land, or taken a lease thereof, supposing at the time of such purchase such title to be good in fee, or such lease to convey and secure the title and interest therein expressed, such defendant shall be entitled to recover of the plaintiff in such action the full value of all improvements made upon such land by such defendant, or those under whom he claims, in the manner hereinafter provided.

Sec. 16. The sum which such land shall be found, at the time of the rendition of such judgment, to be worth more, in consequence of im-

provements so made, than it would have been had no such improvements or betterments been made, shall be deemed to be the value of such betterments.

Sec. 17. The defendant in such action shall, within forty-eight hours after such judgment, or during the term of the court in which the same shall be rendered, file a declaration in a plea of the case against such plaintiff, for so much money as the land is so made better, in the office of the clerk of such court, which shall be sufficient notice to the defendant in such declaration to appear and defend against the same at the next term of such court.

Sec. 18. The court, on the entry of such action of the case, shall stay all proceedings in the action of ejectment until a final judgment shall be rendered in the action of the case; and the lands so recovered shall be held to respond any judgment which shall be rendered on such declaration, in the same manner and for the same time as if the same had been attached on mesne process.

Sec. 19. Execution on the judgment, rendered in such action of the case, shall issue only against the land so recovered in the action of ejectment, and shall not, in any case, issue against the body, or the other lands, or the goods and chattels of the defendant.

Sec. 20. If, on trial, it shall be found necessary that a view be had of the premises, the court, on motion of either party, may grant such view, at the expense of the party making such motion.

Sec. 21. The plaintiff, in an action of ejectment, shall recover nothing for the mesne profits of the land, except on such improvements as were made by him or those under whom he claims.

Sec. 22. If the plaintiff, in the action of the case, shall recover, no execution shall issue on the judgment so recovered until four months from the rendition thereof, and the writ of possession, in the action of ejectment, shall be further stayed for the same time, unless the defendant, in the action of the case, shall pay to the plaintiff in such action, or for his use, to the clerk of the court, the full amount of the judgment in the action of the case, in which case a writ of possession may immediately issue.

Sec. 23. If the execution, issued on the judgment in the action of the case, shall be levied on the land recovered, as aforesaid, the writ of possession shall not issue until one year from the rendition of the judgment in the action of the case, when the same may issue for such part of the land not so levied upon, and for the damages and costs in the action of ejectment.

Sec. 24. The foregoing provisions, relating to betterments, shall not extend to any person who has entered on land by virtue of any contract made with the legal owner of such land, unless it shall appear on the trial of the action of the case, that such owner has neglected to fulfil such contract on his part, in which case, such person in possession shall be entitled to all the privileges hereinbefore provided for those, who entered upon land under supposed title, and the same proceedings

shall be had, and the land shall be held in the same manner, as is hereinbefore provided.

Sec. 25. The foregoing provisions shall not be construed to deprive any person of his remedy at law, against his voucher, and such voucher may give in evidence, under the general issue, in mitigation of damages, the recovery of the plaintiff in such action of the case for betterments.

Sec. 26. If the person, in whom the title shall be found, as aforesaid, shall, during the term of the court in which judgment shall be rendered in the action of ejectment, or, within forty-eight hours after the rising of such court, lodge with the clerk of the court a good warranty deed of the lands, so recovered, to the defendant in such action, no further proceedings shall be had on the declaration for betterments.

Sec. 27. After such deed shall be lodged with the clerk, as aforesaid, the court shall appoint a committee of three disinterested persons from the vicinity in which the land is situated, who shall, on oath, ascertain what would then be the value of such land, if no betterments had been made thereon, and make and return a report thereof, in writing, to the clerk of such court, within three months from the rendition of the judgment, as aforesaid.

Sec. 28. If the defendant, within four years from the time of filing the deed as aforesaid, shall pay to the plaintiff, or to the clerk of said court, for the use of the plaintiff, or his legal representatives, the sum adjudged and reported by such committee, with the costs of such suit and after proceedings, and the interest thereon, in four equal and annual payments, the first of which to be within one year from the time of filing the deed, as aforesaid, no further proceedings shall be had on the judgment rendered in the action of ejectment.

Sec. 29. If the defendant shall neglect to pay either instalment of the sum so reported, with the costs, as aforesaid, with interest from the date of the deed, such deed shall be returned to the plaintiff, and the writ of possession and execution, for all the costs aforesaid, shall issue accordingly.

Sec. 30. If either party shall die, pending any of the aforesaid proceedings relating to betterments, the executor or administrator of such deceased party shall have the same rights, and may perform the same duties, and execute any conveyance, that the deceased party would, or could have done, had he been living; and any conveyance, made by an executor or administrator, agreeably to the provisions of this chapter, shall be effectual to convey all the title of the person, whom he represents, to the land recovered.

Sec. 31. [The provisions of this chapter, relating to betterments, shall not extend to any person, who shall enter upon and take possession of lands after this chapter shall be in force as law,] (*see sec.* 32.)

Sec. 32. The thirty-first section of chapter thirty-five of the Revised Statutes, (sec. 31 *of this chap.*) is hereby repealed. (*Sec.* 1 *of No.* 41 *of* 1848.)

Sec. 33. The provisions of said chapter shall extend to all cases

whatever, that are provided for in said chapter, in the manner and to the same effect, as though the same thirty-first section had not been enacted. (*Sec.* 2 *of No.* 41 *of* 1848.)

Sec. 34. This act, and the chapter to which it is an addition, shall not extend to any person, who shall enter upon and take possession of lands, after the passing of this act. (*Sec.* 3 *of No.* 41 *of* 1848.)

MASSACHUSETTS.

(*Rev. Sts. of Mass., tit.* 3, *ch.* 101.)

OF ACTIONS RELATING TO REAL PROPERTY.

Sec. 1. All estates of freehold, whether in fee simple, fee tail, or for life, may be recovered by a writ of entry upon disseizin, unless when a different action is prescribed by law.

Sec. 2. The demandant shall declare on his own seizin within twenty years then last past, without specifying any particular day, and shall allege a disseizin by the tenant, but need not aver a taking of the profits.

Sec. 3. He shall then set forth the estate that he claims in the premises, whether it is in fee simple, fee tail, or for life, and if the latter, whether it is for his own life, or for the life of another, but he shall not be required, in any case, to set forth the original gift, devise, or other conveyance or title, by which he claims the estate.

Sec. 4. The demandant shall not be required to prove an actual entry under his title, but if he shall prove that he is entitled to such an estate, as he claims in the premises, whether as heir, devisee, purchaser or otherwise, and also that he has a right of entry therein, this shall be deemed sufficient proof of his seizin, as alleged in the declaration, and no such action shall be maintained, unless the demandant has, at the time of commencing the same, a right of entry into the premises.

Sec. 5. No descent or discontinuance, which may hereafter occur, shall take away or defeat any right of entry or of action, for the recovery of real estate.

Sec. 6. Every person, who is in possession of the premises demanded in such writ of entry, claiming any estate of freehold therein, may be considered as a disseizor, for the purpose of trying the right, whatever may have been the manner of his original entry on the premises.

Sec. 7. If the person in possession shall have actually ousted the demandant, or withheld from him the possession of the premises, he may, at the election of the demandant, be considered as a disseizor, for the purpose of trying the right, although he should claim therein an estate less than a freehold.

Sec. 8. Every suit, upon such a writ of entry, shall be prosecuted and conducted in the same manner as if the demandant had, at the time of

commencing the action, made an actual entry on the demanded premises, and had been immediately ousted by the tenant; so that on a trial upon the general issue, if the demandant shall prove that he is entitled to such estate in the premises, as is set forth in the declaration, and that he had a right of entry on the day when the action was commenced, he shall recover the premises, unless the tenant shall prove a better title in himself.

Sec. 9. The law and the practice, relating to the pleadings and evidence, in the said action or writ of entry on disseizin, as now recognized and established, shall continue in force, except so far as they are altered by the provisions of this chapter.

Sec. 10. Persons, claiming the same premises as joint tenants, tenants in common, or coparceners, may all join, or any two or more of them may join, in a suit for the recovery thereof, or any one may sue alone for his particular share.

Sec. 11. The demandant may, in all cases, recover any specific part of the premises, or any undivided portion thereof, to which he shall prove a sufficient title, though such part or portion is less than is demanded in the writ.

Sec. 12. In the case of the death of any party, either demandant or tenant, the action may proceed by or against the survivors, and the heirs of the deceased party, in the manner prescribed in the ninety-third chapter.

Sec. 13. The pleas of nontenure, disclaimer, several tenancy, and sole tenancy, may be pleaded either in bar or in abatement, but no costs shall be allowed to the party pleading the same, except such as shall accrue after the filing of the plea.

Sec. 14. If the demandant recovers judgment in a writ of entry, he shall also be entitled to recover in the same action damages against the tenant, for the rents and profits of the premises, from the time when the demandant's title accrued, subject to the limitations hereinafter contained, and he shall also recover damages for any destruction or waste of the buildings or other property, for which the tenant is by law chargeable.

Sec. 15. If any issue of fact is tried in the case, and found for the demandant, the jury shall at the same time assess his damages, unless it shall be otherwise ordered by the court, as hereinafter provided.

Sec. 16. The rents and profits, for which the tenant shall be liable, shall be the clear annual value of the premises, for the time during which he was in possession thereof, after deducting all lawful taxes and assessments on the premises, that shall have been paid by the tenant, and all the necessary and ordinary expenses of cultivating the land, or of otherwise collecting the rents, profits or income of the premises.

Sec. 17. In estimating the rents and profits, the value of the use, by the tenant, of any improvements, whether made by himself or those under whom he claims, shall not be computed nor allowed to the demandant.

Sec. 18. The tenant shall never be liable for the rents and profits for

any longer term than six years, nor for any waste or other damage committed before that time, unless when the rents and profits are allowed, by way of set-off to his claim for improvements, as hereinafter provided.

Sec. 19. If the demanded premises have been actually held and possessed by the tenant in the action, and by those under whom he claims, for six years next before the commencement of the action, he shall, in case of judgment against him, be entitled to compensation in the manner hereinafter provided, for the value of any buildings or improvements made or erected on the premises by himself, or by any person under whom he claims.

Sec. 20. The tenant shall also be entitled to the like compensation, although the premises should not have been so held so long as six years, provided he holds them under a title which he had reason to believe good.

Sec. 21. When the tenant in the action claims allowance for any such improvements, he shall enter on the record a suggestion of his claim, with a request that the value of the improvements may be ascertained and allowed to him, in case judgment shall be rendered for the demandant.

Sec. 22. The suggestion shall be entered at the same term with the plea, if any, made by the tenant, unless the court shall, for sufficient reasons, allow it to be made afterwards, and if judgment is rendered for the demandant, on default or otherwise, without any plea, the suggestion shall be entered at such seasonable stage of the proceedings, as the court shall prescribe or allow.

Sec. 23. If any issue of fact is tried in the case and found for the demandant, the jury shall at the same time ascertain and determine the sum to be allowed to the tenant for such improvements, unless it shall be otherwise ordered by the court, as provided in the following section.

Sec. 24. If it shall appear to the court, on the motion of either party, that it would be more convenient to postpone the assessment of the sums, due respectively to the demandant for the rents and profits or other damages, or to the tenant for improvements, until after the trial of the title and a verdict thereon, the court may make an order for that purpose, at any time before the verdict on the title is recorded.

Sec. 25. If the assessment of the sums due to either party is so postponed, or if there is no issue of fact tried in the cause, and judgment is to be rendered for the demandant on demurrer, default or otherwise, the said sums shall be assessed by the court, unless either party shall move to have them assessed by a jury, or unless the court shall think proper to have them so assessed, in which cases a jury shall be empannelled to assess the same.

Sec. 26. The sums due for rents and profits, or other damages, and for improvements, may in all cases be assessed by arbitrators or assessors, appointed by the court with the consent of the parties.

Sec. 27. The sum to be allowed for improvements shall never exceed the amount actually expended by the tenant and those under whom he

claims, nor shall it exceed the amount to which the value of the premises is actually increased thereby at the time of the assessment.

Sec. 28. In all cases, when any sum is allowed to the tenant for improvements, it shall be set off against the sum found due from him for rents and profits, and other damages, and if there is a balance due from him, the demandant shall have judgment and execution therefor, as well as for his seizin of the demanded premises.

Sec. 29. If there is any sum due to the tenant for improvements, after deducting the rents and profits, and other damages for which he may be found chargeable, the demandant shall pay the same before taking out his execution for seizin of the premises, and the money may be paid in such case to the tenant himself, or to the clerk of the court for his use; and the demandant shall not be entitled to recover against the tenant, or any person claiming under him, any rents and profits that shall accrue after the judgment, and before he shall have paid the sum so due to the tenant.

Sec. 30. If the sum, found due to the tenant for improvements, exceed the sum due from him for the rents and profits accrued within the six years, he shall be chargeable with the rents and profits accrued before that time, so far as may be necessary to balance his claim for improvents, but in such case he shall not be liable to repay the excess, if any, of the rents and profits beyond the value of the improvements.

Sec. 31. Nothing contained in this chapter shall prevent the demandant from maintaining an action of trespass for mesne profits, or for damage done to the premises, against any person, except the tenant in the writ of entry, who may have had possession of the premises, or may be otherwise liable to such action.

Sec. 32. When the tenant in the action shall claim allowance for improvements, as before provided, the demandant may, by a like entry on the record, require that the value of his estate in the demanded premises, without the improvements, shall also be ascertained and determined.

Sec. 33. The value of the premises in such case shall be estimated, as it would have been at the time of the inquiry, if no such buildings or improvements had been made or erected on the premises by the tenant, or by any person under whom he claims, and this sum shall be ascertained and determined, either by the court or jury, or by arbitrators or assessors, in the same manner as is provided for assessing the sums due for rents and profits, and for improvements.

Sec. 34. The demandant in such case, if judgment is rendered for him, may, at any time during the same term, enter on the record his election to relinquish his estate in the premises to the tenant, at the price or value thereof, so ascertained and determined.

Sec. 35. Such entry, if made by the demandant's attorney in the cause, shall have the same effect as if made by himself.

Sec. 36. If the demandant shall require further time to make his election, as to relinquishing the premises, the court may, on his motion,

suspend the entry of the judgment, and continue the cause, but without any further costs for the demandant.

Sec. 37. If the demandant shall relinquish the premises, as before provided, the tenant shall thenceforth hold all the estate that the demandant had therein at the commencement of the action, provided that he shall pay therefor the said estimated price or value thereof, in the manner following.

Sec. 38. The said price shall be paid in three equal instalments, with interest annually, the first instalment to be paid on or before the expiration of one year from the time when the demandant's election to relinquish the premises shall be entered on the record, the second instalment to be paid on or before the expiration of two years from the time before mentioned, and the third instalment to be paid on or before the expiration of three years from the same time.

Sec. 39. The said sums shall be paid to the demandant, or to the clerk of the court for his use, and if the tenant shall fail to make either of the said payments, within the times before limited therefor, respectively, the demandant shall be entitled forthwith to take out his writ of seizin on the judgment recovered by him, and shall take and hold the premises, without allowance for any improvements that may have been made thereon.

Sec. 40. The expiration of a year after the judgment shall not prevent the issuing of the execution or writ of seizin, in the case mentioned in the preceding section, but it may be taken out, at any time within three months after such default of payment on the part of the tenant.

Sec. 41. If the tenant or his heirs or assigns shall, after the premises are so relinquished to him, be evicted thereof, by force of any better title than that of the original demandant, the person so evicted may recover from such demandant or his executors or administrators, heirs or devisees, as the case may be, the amount so paid for the premises, as so much money had and received by such demandant in his life time, for the use of the plaintiff, with lawful interest therefor, from the time of such payment.

Sec. 42. If the tenant, or the person holding under him, when impleaded in such second action for the recovery of the premises, shall give notice thereof to the person, who is so liable to refund the purchase money, and shall permit such person to defend the action, the judgment, if rendered against the tenant in the action, shall be conclusive as to his right to recover the amount so paid for the premises.

Sec. 43. If the person impleaded does not give such notice to the other party, and permit him to defend the suit, the latter shall be permitted, in the suit afterwards brought against him for the price paid for the premises, to deny the title upon which the second recovery was had, and the party so evicted shall not recover the said price, unless he shall prove that he was evicted by force of a better title than that of the original demandant.

Sec. 44. If, after judgment is rendered for the demandant in a writ

of entry, either party die before the writ of seizin is executed, or before the case is otherwise settled, according to the foregoing provisions, any money payable by the tenant may be paid by him or his executors or administrators, or by any person who is entitled to the estate under him, to the demandant or his executors or administrators, in like manner and with the like effect, as if both parties were living; and any money payable by the demandant may be paid by him or his executors or administrators, or by any person who is entitled to the estate under him, to the tenant or his executors or administrators, in like manner and with the like effect, as if both parties were living.

Sec. 45. The writ of seizin, if issuable in any such case, shall be issued in the name of the original demandant against the original tenant, although either or both of them be dead, and when executed, it shall enure to the benefit of the demandant, or whoever is then entitled to the premises under him, in like manner, as if it had been executed on the day when the judgment was rendered.

Sec. 46. If the demandant in a writ of entry shall claim an estate for life only in the premises, and if he shall pay any sum allowed to the tenant for improvements, he or his executors or administrators, at the determination of his estate, shall be entitled to receive of the remainder-man or revisioner, the value of the said improvements, as they then exist, and shall have a lien therefor on the premises, in like manner as if they had been mortgaged for the payment thereof, and may keep possession thereof accordingly, until the sum be paid.

Sec. 47. If the amount, so due from the remainder-man or reversioner, shall not be agreed on by the parties, it may be ascertained and determined, as is provided for the redemption of a mortgage, upon a bill in equity, to be brought by the remainder-man or reversioner as mortgagor; and the like proceedings shall be had, as are prescribed in that case, for ascertaing the sum due for redemption of the premises, and for the recovery thereof by the remainder-man or reversioner.

Sec. 48. The remainder-man or reversioner, or those claiming under him, shall not, in such case, be limited to the three years prescribed for the redemption of a mortgage, but they shall not, in any case, be entitled to recover from the adverse party any balance in money, although the rents and profits of the premises, which accrued after the determination of the estate for life, exceed the amount due for the improvements.

Sec. 49. The remainder man or reversioner, and those claiming under him, shall, in such case, be considered as disseised at the time of the determination of the life estate, so far as to bar their bill in equity, and all other remedy by action or by entry, for the recovery of the premises, after the expiration of the time prescribed for the limitation of the right of entry and of action, in cases of disseisin.

Sec. 50. Nothing contained in this chapter, concerning the rents and profits to be recovered in a writ of entry, or the allowance for improvements made on the demanded premises, or concerning the estimated value of the premises without the improvements, shall extend or apply to any action, brought by a mortgagee or his heirs or assigns against a

mortgagor or his heirs or assigns, for the recovery of the mortgaged premises.

Sec. 51. All writs of right, and of formedon, and all writs of entry, except that which is allowed and provided for in this chapter, shall be abolished from and after the thirty-first day of December, in the year one thousand eight hundred and thirty-nine, except as is provided in the following section.

Sec. 52. If any person, who, on the said thirty-first day of December, shall be entitled to maintain any of the said actions, which are to be abolished after that day, shall then be within the age of twenty-one years, a married woman, insane, imprisoned, or without the limits of the United States, the action may be brought at any time within five years after the disability shall cease, or after the death of the person so disabled; provided, that no such action shall be maintained, after it would have been barred by the statutes of limitation, in force at and immediately before the time when this chapter shall take effect.

PENNSYLVANIA.

(*Dunlop's Laws of Penn., pp.* 242, 243, 253, 254.)

All writs of ejectment shall be in the form following, and not otherwise, *viz.*

[L. S.] THE COMMONWEALTH OF PENNSYLVANIA.
COUNTY, *ss.*

To the sheriff of said county GREETING.

You are hereby commanded that you summon A. B. to appear before the judges of the court of common pleas in and for said county, to be holden at on the day of next, then and there to answer to a certain complaint made by C. D., that the said A. B. now hath in his actual possession a tract of land, situate in township, in the said county, containing acres or thereabouts, bounded by lands of E. T., G. H., the right of possession or title to which he the said C. D. saith is in him, (or them as the case may be,) and not in the said A. B., all which he the said C. D. averreth he is prepared to prove before our said court, hereof fail not. Witness, J. B., president, (or judge, as the case may be,) of our said court, at the day of Anno Domini, one thousand eight hundred and Attested L. M., prothonotary.

And it shall be the duty of the plaintiff, either by himself, his agent or attorney, to file in the office of the prothonotary of the proper county, on or before the first day of the term, to which the process issued is returnable, a description of the land, together with the number of acres, which he claims and declares that the title is in him, and the defendant shall enter his defence, (if any he hath) for the whole or any part thereof, before the next term, and thereupon issue shall be joined.

The writ of ejectment prescribed in the act to which this is a supplement, shall issue in all cases where lands, tenements or hereditaments are claimed, and give remedy as fully and effectually as in ejectments in the form heretofore used; and all parties having an undivided interest in any such lands, tenements, and hereditaments, whether as joint tenants, co-partners or tenants in common, may join therein, and recover according to their interest and title; and minors may sue by their guardians as in other cases; and the defendant may defend upon his own title or the title of third persons; and the landlord may as heretofore be admitted as defendant, and in such case on the trial, shall admit himself in possession.

Where any writ of ejectment shall be issued, and on the service thereof it shall appear to the sheriff that other persons not named in the writ are in possession of the premises or part thereof, such sheriff shall add the name of such person or persons to such writ, and serve the same, and on return thereof, the prothonotary shall enter such additional defendants to the action, and they shall be parties thereto; and, in case of any of the defendants not appearing, on motion to the court, and on affidavit of the sheriff or other officer, having served the said writ, stating the manner in which the said service was made, and on the same being deemed by the court a service agreeably to law, judgment may be entered by default for such part as he is possessed of; and a writ of possession may issue upon such judgment, and the action may proceed to trial for the residue, against the other defendant or defendants, and the return by the sheriff of having served any such writ on the defendants marked, served by him, shall be evidence of such defendant or defendants being in actual possession of the premises, or part thereof.

No writ of ejectment shall abate by reason of the death of any plaintiff or defendant, but the person or persons next in interest may be substituted in the place of the plaintiff or defendant, who shall have died, pending the writ.

Where two verdicts shall, in any writ of ejectment between the same parties, be given in succession for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought, but where there may be verdict against verdict between the same parties and judgment thereon, a third ejectment in such case, and verdict and judgment thereon shall be final and conclusive, and bar the right, and the plea in ejectment shall be not guilty.

VIRGINIA.

(*Code of Virginia of* 1849, *tit.* 40, *ch.* 135.)

OF THE ACTION OF EJECTMENT.

When and where it may be brought; and of the parties and proceedings.

Sec. 1. The action of ejectment is retained and may be brought as heretofore, subject to the provisions hereinafter contained.

Sec. 2. It may also be brought in the same cases in which a writ of right may now be brought, and by any person claiming real estate in fee or for life, or for years, either as heir, devisee or purchaser, or otherwise.

Sec. 3. Every such action shall be brought in the circuit, county or corporation court, of the county or corporation in which the real estate, or some part thereof, is.

Sec. 4. No person shall bring such action unless he has, at the time of commencing it, a subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof.

Sec. 5. The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising acts of ownership thereon or claiming title thereto, or some interest therein, at the commencement of the suit. If a lessee be made a defendant, at the suit of a party claiming against the title of his landlord, such landlord may appear and be made a defendant with, or in the place of, his lessee.

Sec. 6. The action shall be commenced by the service of a declaration, in which the name of the real claimant shall be inserted as plaintiff; and all the provisions of law, concerning a lessor of a plaintiff, shall apply to such plaintiff.

Sec. 7. It shall be sufficient for the plaintiff to aver in his declaration, that on some day specified therein, (and which shall be after his title accrued,) he was possessed of the premises claimed, and being so possessed thereof, that the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage, such sum as the plaintiff shall state.

Sec. 8. The premises claimed, shall be described in the declaration with convenient certainty, so that, from such description, possession thereof may be delivered.

Sec. 9. The plaintiff shall also state, whether he claims in fee, or for his life, or the life of another, or for years, specifying such lives, or the duration of such term; and when he claims an undivided share or interest, he shall state the same.

Sec. 10. The declaration may contain several counts, and several parties may be named as plaintiffs jointly in one count, and separately in others.

Sec. 11. To such declaration there shall be subjoined a notice in writing, by the plaintiff or his attorney, addressed to the defendant, and notifying him that the said declaration will be filed, on some specified rule day, in the clerk's office of the court, in which the suit is to be prosecuted, or in court, on some named day in the then next term of said court. Such declaration and notice shall be served, in the same manner as other notices.

Sec. 12. Upon filing the declaration, with proof of the service of notice thereof as aforesaid, the plaintiff shall be entitled to a rule upon the defendant, to appear and plead at the next rule day, if the declaration be filed at rules, or if filed in court, to appear and plead within such time as shall be prescribed by the court; and if upon service of such rule, he shall fail so to appear and plead, his default shall be entered and judgment given against him.

Sec. 13. The defendant may demur to the declaration, as in personal actions, or plead thereto, or do both. But he shall plead the general issue only, which shall be, that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff in the declaration. Upon such plea, the defendant may give the same matter in evidence, and the same proceedings shall be had, as upon a plea of *not guilty*, in the present action of ejectment, except as herein otherwise provided, and he may also give in evidence any matter which, if pleaded in the present writ of right, would bar the action of the plaintiff.

What is to be proved at the trial.

Sec. 14. The consent rule, heretofore used, is abolished. The plaintiff need not prove an actual entry on, or possession of the premises demanded, or receipt of any profits thereof, nor any lease, entry or ouster, except as hereinafter provided. But it shall be sufficient for him to show a right to the possession of the premises, at the time of the commencement of the suit.

Sec. 15. If the action be by one or more tenants in common, joint tenants or coparceners, against their co-tenants, the plaintiff shall be bound to prove actual ouster or some other act amounting to total denial of the plaintiff's right as co-tenant.

Sec. 16. If the action be against several defendants, and a joint possession of all be proved, and the plaintiff be entitled to a verdict, it shall be against all, whether they pleaded separately or jointly.

Sec. 17. If the action be against several defendants, and it appear on the trial, that any of them occupy distinct parcels in severalty or jointly, and that other defendants possess other parcels in severalty or jointly, the plaintiff may recover several judgments against them, for the parcels so held by one or more of the defendants, separately from others.

Sec. 18. The plaintiff may recover any specific or any undivided part or share of the premises, though it be less than he claimed in the declaration.

Sec. 19. In a controversy affecting real estate, possession of part shall not be construed as possession of the whole, when an actual adverse possession can be proved.

Equitable defences.

Sec. 20. A vendor, or any claiming under him, shall not, at law any more than in equity, recover against a vendee, or those claiming under him, lands sold by such vendor to such vendee, when there is a writing, stating the purchase and the terms thereof, signed by the vendor or his agent, and there has been such payment or performance of what was contracted to be paid or performed on the part of the vendee, as would in equity entitle him, or those claiming under him, to a conveyance of the legal title of such land from the vendor, or those claiming under him, without condition.

Sec. 21. The payment of the whole sum, or the performance of the whole duty, or the accomplishment of the whole purpose, which any mortgage or deed of trust may have been made to secure or effect, shall prevent the grantee or his heirs from recovering at law, by virtue of such mortgage or deed of trust, property thereby conveyed, wherever the defendant would in equity be entitled to a decree, re-vesting the legal title in him, without condition.

Sec. 22. A defendant shall not be allowed to avail himself of either of the two preceding sections, unless notice in writing, of such defence, shall have been given, sixty days before the trial. Whether he shall or shall not make or attempt such defence, he shall not be precluded from resorting to equity for any relief to which he would have been entitled, if the said sections had not been enacted.

Verdict and judgment.

Sec. 23. If the jury be of opinion for the plaintiffs, or any of them, the verdict shall be for the plaintiffs, or such of them as appear to have right to the possession of the premises, or any part thereof, and against such of the defendants, as were in possession thereof, or claimed title thereto, at the commencement of the action.

Sec. 24. Where any plaintiff appears to have no such right, the verdict as to such plaintiff shall be for the defendants.

Sec. 25. When the right of the plaintiff is proved to all of the premises claimed, the verdict shall be for the premises generally, as specified in the declaration, but if it be proved to only a part or share of the premises, the verdict shall specify such part particularly, as the same is proved, and with the same certainty of description, as is required in the declaration.

Sec. 26. If the verdict be for an undivided share or interest in the

premises claimed, it shall specify the same, and if for an undivided share or interest of a part of the premises, it shall specify such share or interest, and describe such part as before required.

Sec. 27. The verdict shall also specify the estate found in the plaintiff, whether it be in fee or for life, stating for whose life, or whether it be a term of years, and specifying the duration of such term.

Sec. 28. If the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be according to the fact, and judgment shall be entered for his damages, sustained from the withholding of the premises by the defendant, and as to the premises claimed, the judgment shall be, that the defendant go thereof without day.

Sec. 29. The judgment for the plaintiff shall be, that he recover the possession of the premises, according to the verdict of the jury, if there be a verdict, or if the judgment be by default, or on demurrer, according to the description thereof in the declaration. If the action be brought to recover dower, which has not been assigned before the commencement of such action, the court, in which the judgment is rendered, may have dower assigned by commissioners appointed for that purpose.

How rents and profits, &c., recovered.

Sec. 30. If the plaintiff file with his declaration a statement of the profits and other damages which he means to demand, and the jury find in his favor, they shall at the same time, unless the court otherwise order, assess the damages for *mesne* profits of the land for any period not exceeding five years previously to the commencement of the suit until the verdict, and also the damages, for any destruction or waste of the buildings or other property, during the same time, for which the defendant is chargeable.

Sec. 31. If there be no issue of fact tried in the cause, and judgment is to be rendered for the plaintiff on demurrer, default or otherwise, the said damages shall be assessed by the court, unless either party shall move to have them assessed by a jury, or the court shall think proper to have them so assessed, in which cases a jury shall be empanneled, to assess them.

Sec. 32. If the defendant intends to claim allowance for improvements, made upon the premises by himself or those under whom he claims, he shall file with his plea or at a subsequent time before the trial (if for good cause allowed by the court,) a statement of his claim therefor, in case judgment be rendered for the plaintiff.

Sec. 33. In such case the damages of the plaintiff, and the allowance to the defendant for improvements shall be estimated, and the balance ascertained, and judgment therefor rendered, as prescribed in the one hundred and thirty-sixth chapter.

Sec. 34. On the motion of either party, the court may order the assessment of such damages, and allowance, to be postponed until after the verdict on the title is recorded.

Effect of judgment in ejectment.

Sec. 35. Any such judgment in an action of ejectment, instituted after this chapter takes effect, shall be conclusive, as to the title or right of possession established in such action, upon the party against whom it is rendered, and against all persons claiming from, through or under such party, by title accruing after the commencement of such action, except as hereinafter mentioned.

Sec. 36. If any person, against whom such judgment is rendered, shall be, at the time of the judgment, an infant, married woman, or insane, the judgment shall be no bar to an action, commenced within five years after the removal of such disability.

Sec. 37. Nothing in this chapter shall prevent the plaintiff from recovering *mesne* profits, or damages done to the premises, from any person, other than the defendant, who may be liable to such action.

Real actions abolished.

Sec. 38. No writ of right, writ of entry, or writ of formedon, shall be brought after the commencement of this act.

MICHIGAN.

(*Rev. Sts. of Michigan, tit.* 23, *ch.* 108.)

OF THE ACTION OF EJECTMENT.

Sec. 1. The action of ejectment is retained, and may be brought, in the cases and in the manner heretofore accustomed, subject to the provisions hereinafter contained.

Sec. 2. The action of ejectment may also be brought,

1. In the same cases, in which a writ of right may now be brought by law to recover lands, tenements, or hereditaments, and by any person claiming an estate therein, in fee or for life, either as heir, devisee, or purchaser:

2. By any widow entitled to dower, or by a woman so entitled and her husband, after the expiration of six months from the time her right accrued, to recover her dower of any lands, tenements, or hereditaments.

Sec. 3. No person can recover in ejectment, unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest, or portion thereof, to be proved and established at the trial.

Sec. 4. If the premises, for which the action is brought, are actually occupied by any person, such actual occupant shall be named a defendant in the declaration; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit; and all persons claiming any title to the premises, adverse to that claimed by the plaintiff, may, in all cases, be made defendants in the action.

Sec. 5. The suit shall be commenced by the filing of a declaration, entering a rule to plead, and serving a copy of the declaration and notice of the rule to plead, in the same manner as in personal actions, except as hereinafter provided; and, in such declaration, the names of the real claimants shall be inserted as plaintiffs, and all the former provisions of law, concerning lessors of a plaintiff, shall apply to such plaintiffs.

Sec. 6. The use of fictions (*fictitious*) names of plaintiffs or defendants, and of the names of any other than the real claimants and the real defendants, and the statement of any lease or demise to the plaintiff, and of an ejectment by a casual or nominal ejector, are abolished.

Sec. 7. It shall be sufficient for the plaintiff to aver in his declaration, that, on some day therein to be specified, and which shall be after his title or right accrued, he was possessed of the premises in question, describing them as hereinafter provided, and, being so possessed thereof, that the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage, any nominal sum the plaintiff shall think proper to state.

Sec. 8. In such declaration, the premises claimed shall be described with such convenient certainty, by setting forth the section or part of a section, township, and range, or the number of the lot, or otherwise, that from such description; possession of the premises claimed may be delivered.

Sec. 9. If such plaintiff claims an undivided share or interest in any premises, he shall state the same particularly in such declaration.

Sec. 10. If the action be brought for the recovery of dower, the declaration shall state that the plaintiff was possessed of the one undivided third part of the premises, as her reasonable dower as widow of her husband, naming him. In every other case, the plaintiff shall state whether he claims in fee, or whether he claims for his own life, or for the life of another, or for a term of years, or otherwise, specifying such lives, or the duration of such term.

Sec. 11. In any case other than where the action is brought for the recovery of dower, the declaration may contain several counts, and several parties may be named as plaintiffs, jointly in one count, and separately in others.

Sec. 12. All the provisions of law, relating to the endorsement of declarations, as security for costs, and the liability of endorsers in cases

of personal actions, commenced by declaration, shall be applicable to the action of ejectment.

Sec. 13. If the premises are actually occupied, the declaration shall be served by delivering a copy thereof, with the notice above prescribed, to the defendant named therein, who shall be in the occupation thereof, personally, or by leaving the same with some person of proper age, at the dwelling-house of such defendant, if he be absent.

Sec. 14. If any defendant named in such declaration shall not occupy the premises claimed, the declaration and notice shall be served on such defendant, personally, or, if he cannot be found, by leaving the same with some person of proper age, at the residence of such defendant.

Sec. 15. But, when the declaration shall have been served in any other manner than upon the defendant personally, no default for not pleading shall be entered without the special order of the court.

Sec. 16. Upon filing the certificate of the sheriff, or an affidavit of the due service of a copy of the declaration and notice of the rule to plead personally on the defendant, his appearance shall be entered; and, in case he shall neglect to plead, within the time prescribed by such rule, his default for not pleading may be entered in like manner as in personal actions.

Sec. 17. A defendant in ejectment may, at any time before pleading, apply to the court, or to any judge thereof, or circuit court commissioner, in vacation, to compel the attorney for the plaintiff to produce to such court or officer his authority for commencing the action in the name of any plaintiff therein.

Sec. 18. Such application shall be accompanied by an affidavit of the defendant, that he has not been served with proof, in any way, of the authority of the attorney to use the names of the plaintiffs stated in the declaration.

Sec. 19. Upon such application, the court or officer shall grant an order requiring the production of such authority, and shall stay all proceedings in the action, until the same be produced.

Sec. 20. Any written request of such plaintiff or his agent, to commence such action, or any written recognition of the authority of the attorney to commence the same, or any verbal authority, duly proved by the affidavit of such attorney or other competent witness, shall be sufficient presumptive evidence of such authority.

Sec. 21. If it shall appear that, previous to such application by any defendant, he was served with the affidavit of the plaintiff's attorney, showing his authority to commence such action, such application shall be dismissed, and such defendant shall be liable for the costs of resisting such application, the payment of which may be compelled by attachment, as in other cases, which may be issued upon proof of disobedience to the order of the court or officer directing the payment of such costs.

Sec. 22. The defendant may demur to the declaration, as in personal actions; or he shall plead the general issue only, which shall be the

same as in personal actions, and the filing and service of such plea or demurrer shall be deemed an appearance in the cause, and upon such plea the defendant may give the same matter in evidence, and the same proceedings shall be had, as upon the plea of not guilty in the present action of ejectment.

Sec. 23. Upon such plea, the defendant may give in evidence any matter which, if pleaded in the present writ of right or action of dower, would bar the action of the plaintiff.

Sec. 24. It shall not be necessary for the plaintiff to prove an actual entry under title, nor the actual receipt of any profits of the premises demanded; but it shall be sufficient for him to show a right to the possession of such premises, at the time of the commencement of the suit, as heir, devisee, purchaser, or otherwise.

Sec. 25. It shall not be necessary, on the trial, for the defendant to confess, nor the plaintiff to prove, lease, entry, and ouster, or either of them, except as provided in the next section; but this section shall not be construed to impair, nor in any way to affect, any of the rules of evidence now in force, in regard to the maintenance and defence of the action.

Sec. 26. If the action be brought by one or more tenants in common, or joint tenants, against their co-tenants, the plaintiff, in addition to all other evidence which he may be bound to give, shall be required to prove, on the trial of the cause, that the defendant actually ousted such plaintiff, or did some other act amounting to a total denial of his right as such co-tenant.

Sec. 27. If the action be brought against several defendants, and a joint possession or claim of title of all be proved, the plaintiff shall be entitled to a verdict against all, whether they shall have pleaded separately or jointly.

Sec. 28. When the action is against several defendants, if it appear on the trial that any of them, at the commencement of the suit, occupied or claimed distinct parcels in severalty or jointly, and that other defendants possessed or claimed other parcels, in severalty or jointly, the plaintiff shall elect at the trial, and before the testimony shall be deemed closed, against which he will proceed; and a verdict shall thereupon be rendered for the defendants not proceeded against.

Sec. 29. In the following cases, the verdict shall be rendered as follows:

1. If it be shown, on trial, that all the plaintiffs have a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiffs, generally:

2. If it appear that one or more of the plaintiffs have a right to the possession of the premises, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant:

3. If the verdict be for any plaintiffs, and there be several defendants, the verdict shall be rendered against such of them as were in

possession of the premises, or as claimed title thereto, at the commencement of the action:

4. If the verdict be for all the premises claimed, as specified in the declaration, it shall in that respect be for such premises generally;

5. If the verdict be for a part of the premises described in such declaration, the verdict shall particularly specify such part as the same shall have been proved, with the same certainty hereinbefore required in the declaration, in the description of the premises claimed:

6. If the verdict be for an undivided share or interest in the premises claimed, it shall specify such share or interest; and if for an undivided share in a part of the premises claimed, it shall specify such share, and shall describe such part of the premises as hereinbefore required:

7. The verdict shall also specify the estate or right which shall have been established on the trial, by the plaintiff in whose favor it shall be rendered, whether such estate be in fee, or for his own life, or for the life of another, stating such lives, or whether it be a term for years, or otherwise, and specifying the duration of such term.

Sec. 30. If the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be rendered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed, and that as to the premises claimed, the defendant go thereof without day.

Sec. 31. The action of ejectment shall not be abated by the death of any plaintiff, or of one of the several defendants after issue and before verdict or judgment: but the same proceedings may be had as in other actions, to substitute the names of the executors or administrators, or of those who may succeed to the title of the plaintiff so dying, in which case the issue shall be tried as between the original parties; and in case of the death of a defendant, the cause shall proceed against the other defendants.

Sec. 32. In cases where no other provision is made, the judgment in the action, if the plaintiff prevail, shall be, that the plaintiff recover the possession of the premises according to the verdict of the jury, if there was such verdict; or, if the judgment be by default, according to the description thereof in the declaration, with costs to be taxed.

Sec. 33. The plaintiff recovering such judgment shall be entitled to a writ of possession, which shall be substantially in the following form:

"In the name of the people of the state of Michigan:

To the sheriff of the county of

Whereas, A. B. has lately, in our Circuit Court for the county of , by the judgment of said court, recovered against C. D. the following described premises, to wit: (describing the premises recovered, with like certainty as above provided,) which said premises have been, and are still unjustly withheld from the said A. B. by the said C. D., whereof he is convicted, as appears to us of record; and, forasmuch

as it is adjudged in the said court that the said A. B. have execution upon said judgment against the said C. D., according to the force, form, and effect of his said recovery; therefore, we command you, that, without delay, you deliver to the said A. B. possession of the said premises so recovered, with the appurtenances; and that you certify to our said court, at, &c., on, &c., in what manner you shall have executed this writ. (If there be costs to be collected, the proper clause may here be inserted.)

Witness, &c."

Sec. 34. Upon a judgment against the plaintiff, or one or more plaintiffs, in cases where they shall be liable for costs, execution for the collection of the same shall be issued, as upon judgments in personal actions.

Sec. 35. Every judgment in the action of ejectment, rendered upon a verdict, shall be conclusive as to the title established in such action, upon the party against whom the same is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action, subject to the exceptions hereinafter contained.

Sec. 36. The court in which such judgment shall be rendered, at any time within three years thereafter, upon the application of the party against whom the same was rendered, his heirs, executors, administrators, or assigns, and upon payment of all costs and damages recovered thereby, shall vacate such judgment, and grant a new trial in such cause; and the court, upon subsequent application made within two years after the rendering of the second judgment in said cause, if satisfied that justice will be thereby promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment and grant another new trial: but no more than two new trials shall be granted under this section.

Sec. 37. Every judgment in ejectment, rendered by default, shall, from and after three years from the time of rendering the same, be conclusive upon the defendant, and upon all persons claiming from or through him, by title accruing after the commencement of the action; but, within five years after the rendering of such judgment, on the application of the defendant, his heirs, executors, administrators, or assigns, the court may vacate such judgment and grant a new trial, if such court shall be satisfied that justice will thereby be promoted, and the rights of the parties more satisfactorily ascertained and established.

Sec. 38. The Circuit Court may make such rules, in relation to staying proceedings upon the judgment, on application being made for a new trial under the two last sections, as such court may deem necessary to protect the rights of parties thereto.

Sec. 39. If the defendant in an action of ejectment, at the time of docketing the judgment therein by default, be either,

1. Within the age of twenty-one years: or,

2. Insane: or,

3. Imprisoned on any criminal charge, or in execution upon conviction of a criminal offence, for any term less than for life: or,

4 A married woman:

The time during which such disability shall continue, shall not be deemed any portion of the said three years; but any such person may bring an action for the recovery of such premises after that time, and within three years after such disability shall be removed, but not after that period.

Sec. 40. If the person entitled to commence such action, shall die during the continuance of any disability specified in the preceding section, and no determination or judgment be had of or upon the title, right, or action so to him accrued, his heirs, executors or administrators may commence such action, after the time above limited for that purpose, and within three years after his death.

Sec. 41. If the plaintiff shall have taken possession of the premises by virtue of any recovery in ejectment, such possession shall not in any way be affected by the vacating of any judgment, as herein provided: and if the defendant recover on any new trial hereby authorized, he shall be entitled to a writ of possession, in the same manner as if he were plaintiff.

Sec. 42. Upon any new trial granted as herein provided, the defendant may show any matters in bar of a recovery, which he might show to entitle him to the possession of the premises if he were plaintiff in the action.

Sec. 43. The plaintiff recovering judgment in ejectment in any of the cases in which such action may be maintained, shall also be entitled to recover damages for rents and profits of the premises recovered; but if such action be brought for the recovery of dower, the plaintiff shall be entitled to recover such damages only in the cases, and to the extent prescribed in the preceding sixty-sixth chapter.

Sec. 44. The plaintiff seeking to recover such damages, shall, within one year after the docketing of the judgment, make and file a suggestion of such claim, which shall be entered, with the proceedings thereon, upon the record of such judgment, or be attached thereto, as a continuation of the same.

Sec. 45. Such suggestion shall be substantially in the same form as is now in use for a declaration in an action of assumpsit for use and occupation, as near as may be, and may be against the defendants liable for such rents and profits, omitting those not so liable: and a rule to plead thereto shall be entered, and a copy thereof, with a notice of such rule, shall be served on the defendants named therein, in the same manner as in cases of declarations in personal actions.

Sec. 46. Such defendants may plead to such suggestion, and give notice of any special matters in bar of such claim, except such as were or might have been controverted in such action of ejectment, in the same manner as in personal actions; and such defendants may show on the trial, in bar or in mitigation of the damages claimed by the plaintiff, a recovery of (*by*) such defendants, or by any other person, of the same

premises, or of part thereof, subsequent to the verdict in such action of ejectment.

Sec. 47. If any issue of fact be joined on such suggestion, it shall be tried as in other causes, and, if such issue be found for the plaintiff, the same jury shall assess his damages, to the amount of the mesne profits received by the defendant, since he entered into the possession of the premises, subject to the restrictions hereinafter contained.

Sec. 48. On the trial of such issue, the plaintiff shall be required to establish, and the defendant may controvert the time when such defendant entered into the possession of the premises; the time during which he enjoyed the mesne profits thereof; and the value of such profits; and the record of the recovery in the action of ejectment shall not be evidence of such time.

Sec. 49. On such trial, the defendant shall have the same right to set off permanent improvements made on the premises, to the amount of the plaintiff's claim, as is now allowed by law; and, in estimating the plaintiff's damages, the value of the use by the defendant, of any improvements made by him, or purchased by him in good faith from any person from whom he derives color of title thereto, shall not be allowed to the plaintiff.

Sec. 50. When the defendant in ejectment, or any person through whom he claims title, shall have been in actual possession of the premises for six successive years, or more, after this chapter shall take effect as a law, and before the commencement of the action, and claiming title either by virtue of, or in opposition to, a sale made by any executor, administrator, or guardian, or the auditor general, or any county treasurer, or other person or body corporate, authorized by any statute to make sale of land for non-payment of taxes, such defendant shall be allowed a compensation for the value of any buildings and improvements on the premises made by him, or any person through whom he claims title.

Sec. 51. In all cases of such possession of the premises by the defendant, he may file a claim, in writing, to compensation for buildings and improvements on the premises, and a request for an estimation by the jury, of the increased value of the premises by reason thereof; and the plaintiff may file a request in writing that the jury would also estimate what would have been the value of the premises, at the time of trial, if no buildings had been erected, or improvements made, or waste committed, both which estimates it shall be their duty to make, and, in their verdict, state to the court.

Sec. 52. If, after the rendition of the verdict, the plaintiff shall, at the same or next subsequent term of the court, make his election on record, to abandon the premises to the defendant at the value estimated by the jury, then judgment shall be rendered against the defendant for the sum so estimated by the jury, with costs of suit, which judgment shall be a lien upon the premises in question, and execution may issue on such judgment, and be levied upon such premises, and the same may be sold by virtue thereof, in the same manner, and with the like effect, as any other real estate of the defendant.

Sec. 53. If the plaintiff shall not elect to abandon the premises to the defendant, he shall, within one year after the rendition of the judgment for recovery of the premises, pay to the clerk of the court for the use of the defendant, such sum as shall have been assessed for the buildings and improvements, with interest thereon; and no writ of possession shall issue on the judgment rendered on the verdict, nor any new action be sustained for the land until such sum is paid, and a default to pay to said clerk as aforesaid, shall be deemed an abandonment of all claim of title to the premises, and be a bar to the recovery thereof.

Sec. 54. The plaintiff shall not be entitled to recover the rents and profits of the land so recovered, for any longer term than six years immediately preceding the time when such suggestion shall be served on the defendant.

Sec. 55. If no issue of fact be joined on such suggestion, and judgment be rendered thereon against the defendant by default, on demurrer, or otherwise, the value of such mesne profits shall be assessed, and the plaintiff's damages ascertained in the same manner as in other cases.

Sec. 56. Upon such assessment, the plaintiff shall be required to establish the same matters herein before required, in the case of an issue being joined, and the defendant may in like manner, controvert the same, and make any set-off to which he shall be entitled, and the jury shall assess the damages in the same manner.

Sec. 57. Upon the return of an inquisition of damages, or upon the verdict of the jury in case of an issue being joined, the court shall render judgment as in actions of assumpsit, for use and occupation, which shall have the like effect in all respects.

Sec. 58. If the plaintiff in ejectment shall have died after issue joined, or judgment therein, his personal representatives may enter a suggestion of such death, and of the granting of letters testamentary or of administration to them, and may suggest their claim to the mesne profits of the premises recovered, in the same manner and with the like effect as the deceased might have done if still living; and the same proceedings in all respects shall be had thereon.

Sec. 59. If an action be brought to recover the dower of any widow, which shall not have been admeasured to her before the commencement of such action, instead of a writ of possession being issued, such plaintiff shall proceed to have her dower assigned to her in the manner following:

1. Upon the filing of the record of judgment, the court, on the motion of the plaintiff, shall appoint three discreet and disinterested freeholders, commissioners, for the purpose of making admeasurement of the dower of the plaintiff, out of the lands described in the record; and the commissioners so appointed shall proceed in like manner, possess the like powers, and be subject to the like obligations as commissioners appointed by the judge of probate to set off dower:

2. The commissioners shall make a report of their doings to the

court in writing, as soon as may be after their appointment, which report shall be confirmed by such court, unless good cause to the contrary be shown, and shall be entered at large in the minutes of such court:

3. Upon the confirmation of the report of the commissioners, a writ of possession shall be issued to the sheriff of the proper county, describing the premises assigned for the dower, and commanding the sheriff to put the plaintiff in possession thereof.

Sec. 60. The costs and expenses incurred in such admeasurement, shall be subject to the same provisions as in cases of admeasurement of dower by commissioners appointed by the judge of probate.

Sec. 61. No action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the mortgaged premises, until the title thereto shall have become absolute upon a foreclosure of the mortgage.

NOTE.

ADVERSE POSSESSION.

Pages 55 to 63, inclusive, with the notes thereto, show in what cases, the defence of adverse possession cannot be sustained; it only remains, therefore, to point out what is necessary to constitute an effectual adverse possession, in cases where it can be set up as a defence. But for a thorough understanding of the subject, a previous knowledge of the object and intent of the statutes of limitations, as explained in the opinions of the superior courts of law and equity, is essentially necessary. Some of the most important of those opinions are, therefore, inserted.

"The object of the law, [the statute of limitations,] is to secure the individual from the machinations of dishonesty when attempted under the advantages attendant upon the lapse of time, loss of papers, and death of witnesses. But, when cases present themselves in which no laches can be imputed to the plaintiffs, but great injustice would be done by applying to such cases the effect of the statute, the conclusion of reason and of the law is that such cases were not in the mind of the Legislature when enacting the law. Such are the cases of a want of parties, plaintiff or defendant, whereby a temporary suspension of legal remedy takes place. But, in no case of a voluntary abandonment of an action, has an exception to the statute of limitations been supported." Richards and others v. The Maryland Insurance Company, 8 Cranch's Rep. 92, 93. (Per JOHNSON, J., delivering the opinion of the court.)

So in the case of Robinson v. Campbell, 3 Wheat. Rep. 224, TODD, J., delivering the opinion of the court, said: "The last question is, whether the statute of limitations of Tennessee was a good bar to the action. It is admitted, that it would be a good bar only upon supposition that the lands in controversy were always within the limits of Tennessee; but there is no such proof in the cause. The compact of the states [Virginia and Tennessee] does not affirm it, and the present boun-

dary was an amicable adjustment by that compact. It cannot, therefore, be affirmed by any court of law, that the land was within the reach of the statute of limitations of Tennessee until after the compact of 1802. The statute could not begin to run until it was ascertained that the land was within the jurisdictional limits of the state of Tennessee."

The statute of limitations is suspended during war, as to alien enemies. Ogden v. Blackledge, 2 Cranch's Rep. 272.

A war suspends the operation of the statute of limitations between the citizens of the two countries, for the time during which it continues. Wall *ads.* Robson, 2 Nott & M'C. Rep. 498.

"The statute of limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those who have remained in possession under color of a title believed to be good." M'Iver et al. v. Ragan et al., 2 Wheat. Rep. 29. Per MARSHALL, Ch. J., delivering the opinion of the court.

"It must be, as I understand the law, such a title as the law will *prima facie*, consider a good title." Jackson ex dem. Van Eyck et al. v. Frost, 5 Cow. Rep. 351. Per SAVAGE, Ch. J., delivering the opinion of the court. *Et vide*, Francoise *v.* De La Ronde, 8 Martin's Rep. 619. Bonne et al. *v.* Powers, 3 Martin's Rep. (N. S.) 458.

"Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish, that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance." Sturges *v.* Crowninshield, 4 Wheat. Rep. 207. Per MARSHALL, Ch. J., delivering the opinion of the court.

"Every statute of limitations, being in restraint of right, must be construed strictly." Pease *v.* Howard, 14 Johns. Rep. 480. Per VAN NESS, J., delivering the opinion of the court.

To constitute a valid and effectual adverse possession, it is necessary,

1*st. That it be commenced under color and claim of title:*

"To constitute an adverse possession, there must be possession under color and claim of title."—"It has never been considered as necessary to constitute an adverse possession, that there should be a rightful title." Smith ex dem. Teller et al. *v.* Burtis et al., 9 Johns. Rep. 179, 180. Same point, Jackson ex dem. Roosevelt *v.* Wheat, 18 Johns. Rep. 40. Jackson ex dem. Vanderlyn & Betts *v.* Newton et al., 18 Johns. Rep. 355; Jackson ex dem. Gansevoort et al. *v.* Parker, 3 Johns. Cas. 124; Jackson ex dem. Young et al. *v.* Ellis et al., 13 Johns. Rep. 118; Jackson ex dem. Swartout et ux. *v.* Johnson, 5 Cow. Rep. 92; Jackson ex

dem. Ten Eyck et al. *v.* Frost, 5 Cow. Rep. 350; Jackson ex dem. Young et al. *v.* Camp, 1 Cow. Rep. 609; Jackson ex dem. Guilliland et al. *v.* Woodruff et al., 1 Cow. Rep. 285. *Et vide* Seymour *v.* De Lancey et al., 1 Hopk. Rep. 448; Jackson ex dem. Gansevoort et al. *v.* Lunn, 3 Johns. Cas. 115, 117; Jackson ex dem. Hasbrouck *v.* Vermilyea, 6 Cow. Rep. 680.

"Seven years' possession without a color of title, is not sufficient to bar the plaintiff in ejectment." Stanley *v.* Turner, Cam. & Norw. Rep. 545. Same case, 2 Hayw. Rep. 336. *Et vide* Anonymous case, 2 Hayw. Rep. 134. Den ex dem. Jones *v.* Ridley, 2 N. Car. Law Rep. 399. Den ex dem. Stanley *v.* Turner, 1 Murph. Rep. 14. Den ex dem. Midford et ux. *v.* Hardison, 3 Murph. Rep. 166.

To constitute an adverse possession, there need not be a fence, a building, or other improvements made; it suffices for this purpose that visible notorious acts are exercised on the premises in controversy, for twenty-one years after an entry under a claim and color of title. Lessee of Ewing *v.* Burnett, 11 Peters' Rep. 41.

"Adverse possession, is a possession under color and claim of title." 9 Johns. Rep. 179, 180. Rogers *v.* Hillhouse, 3 Conn. Rep. 403.

"The act of limitations ripens no possession into title, which is unaccompanied with a color of title." Borrets *v.* Turner, 2 Hayw. Rep. 114. ——— *v.* Ashe, ib. 104. Armour *v.* White, ib. 69. Grant *v.* Winborne, ib. 57. Anonymous, ib. 134. *Et vide* Patton's Lessee *v.* Easton, 1 Wheat. Rep. 480. Tasker's Lessee *v.* Whittington, 1 Harr. & M'Hen. Rep. 151. Hatch *v.* Hatch, 2 Hayw. Rep. 34.

In the case of Innis *v.* Miller et al., 10 Martin's Rep. 292, the defendant set up a title by prescription, and to make out the requisite length of time attempted to connect their possession with that of their predecessor, but the court said: "Three things must concur, in order that they may unite the possession of their predecessors to their own: 1. He must have possessed in good faith and under color of title. 2. It must be continued, and without interruption. 3. It must be that which the possessor had at the moment of the tradition. The defendants have failed to bring themselves within either of these rules."

An individual put in possession by the Spanish government, by metes and bounds, of a part of the king's land, as her own, acquired such title which, strengthened by long possession, must prevail. Sanchez et ux *v.* Gonzales, 11 Martin's Rep. 207.

In the case of Bloss *v.* ——, decided October Term, 1802, 2 Hayw. Rep. 223, JOHNSON, J., said: "Seven years' possession without a color of title, will bar the plaintiff's right to an ejectment." But the reporter

adds the following note: "*Quære*, as to the seven years' naked possession being a bar to the plaintiff; for it is not law as the court of conference has since decided. *Vide* Stanley *v.* Turner, decided June Term, 1804, Cam. & Norw. Rep. 545. Same case, December, 104, 2 Hayw. Rep. 336.

In the case of Somerville *v.* Hamilton, 4 Wheat. Rep. 233, where a party had been in possession more than seven years under claim of title, per STORY, J., delivering the opinion of the court, said: "A possession for such a length of time, under title, was, by the statute of limitations of North Carolina, a conclusive bar against any suit by any adverse claimant, unless he was within some one of the exceptions or disabilities provided for by that statute."

Under the statute of limitations of Tennessee of 1797, c. 43, s. 4, peaceable and uninterrupted possession, claiming to hold the land adverse to the claims of all other persons, for seven years, under a grant or deed of conveyance founded on a grant, gives a complete title to the person who has the possession. Piles et al. *v.* Bauldin et al., 11 Wheat. Rep. 325.

But the mere failure to sue for seven years does not bar the title, without an adverse claim. Noddy *v.* The State's Lessee, 8 Yerger's Rep. 249.

A devise is color of title, and seven years possession under it bars the right of entry. Den ex dem. Evans *v.* Satterfield, 1 Murph. Rep. 413.

Although it is well settled in the state of New York, and in most of the other states of the Union, that a possession, to be adverse to the true owner, must be under color and claim of title; yet a contrary opinion seems to be held in some few of the states; and, in one instance, at least, the question was left undecided.

In the case of the Lessee of Potts *v.* Gilbert, decided in the district court of the United States for the district of Pennsylvania in the third circuit, 1 Hall's Journal of Jurisprudence, 256, WASHINGTON, Judge, in his charge to the jury, said: "Whether to support the possession of a person who enters without title upon a piece of land, who encloses, improves and cultivates it, and continues the same peaceably for the space of twenty-one years, it is incumbent upon him to show that such possession was taken and continued under a claim or color of title, is a question of great importance, and in my opinion, of no small difficulty. The affirmative of this question seems to be maintained by the learned Judges of New York, and that opinion is therefore entitled to our highest respect. My own mind is not decided upon this point, and as it is not material to the decision of this case, I shall express no opinion upon it."

In Anderson *v.* Gilbert, 1 Bay's Rep. 375, 376, BAY, J. held, "That whenever a party intended to rely on possession for title, it was necessary either to prove payment of a consideration, or other color of a title; because it *was occupancy alone* that the law regarded, as a sufficient title in such cases." *Et vide*, Strange *v.* Durham, 3 Bay's Rep. 429.

In Gay *v.* Moffit, 2 Bibb's Rep. 206, which was an action of ejectment, Judge LOGAN, who delivered the opinion of the court, said; "It will be admitted that a mere *naked possession* for twenty years will in general bar this action. But a right thus derived must be founded on an *adverse possession.*

And in the case of Den ex dem. Van Winkle *v.* Alpough, 2 Penn. Rep. 452, PENNINGTON, J., said; "Whether Fairly went into possession under an equitable title, or under no title at all, is, in my view of the subject, immaterial, if he held as his own and denied the right of Johnson."

And this seems *formerly* to have been the doctrine in Connecticut; for in the case of Trowbridge *v.* Royce, 1 Root's Rep. 50, where it appeared upon the evidence, that "the plaintiff's ancestor more than fifteen years before the commencement of the suit, gave the defendant license to build a shop upon this plot of ground, without any consideration, and to use and improve it without any limitation as to time, or reserving any rent, that the defendant accordingly built a shop on said ground, and had continued to use, improve, and enjoy it as his own without any claim or molestation from any person for more than fifteen years, &c. Verdict and judgment for the defendant." *Et vide*, Lane *v.* Copley, 1 Ibid. 68; Smith *v.* Isaacs, 1 Ibid. 151; Miller *v.* Dow, 1 Ibid. 412.

And in the case of Overfield *v.* Christie et al., 7 Serg. & R. Rep. 177, TILGHMAN, Ch. J., delivering the opinion of the court, said; "Our law permits all persons, whether in or out of seisin or possession, to transfer their claim, such as it is, good or bad, by deed or will. And I have no manner of doubt, that one who enters as a trespasser, clears land, builds a house and lives in it, acquires *something which he may transfer to another;* and if the possession of the two added together, amounts to twenty-one years, and was *adverse to him who had the legal title*, the act of limitations will be a bar to his recovery."

Actual occupation of land for twenty-one years, however tortious, or destitute of color of title, gives a right to the extent of the inclosure, against all the world, but the state. Munshower et al. *v.* Patton, 10 Serg. & R. Rep. 334.

But no act or deed which is void can be the foundation of an adverse possession, for it can give no *color of title.*

A sheriff's deed, which is void for want of jurisdiction in the court under whose judgment the sale took place, is not such a conveyance as that a possession under it will be protected by the statute of limitations. Den ex dem. Walker *v.* Turner, 9 Wheat. Rep. 541. And in citing the case of Harris and Holmes *v.* Bledsoe's Lessee, decided by the supreme court of errors and appeals of the state of Tennessee, in January, 1821, the supreme court of the United States coincide with the opinion given by the court of Tennessee, and say; "But the infirmity of the defendant's title lay in one of the links of the chain, which was that of a deed from executors who had no power to sell and convey by the law, nor was it given by the will of the testator. Even a deed of confirmation, which was executed with a view to cure this defect in the title, was unavailing, 'because,' to use the language of one of the judges, 'the act to be confirmed was void.'" Ibid 551; *et vide* Pray *v.* Pierce, 7 Mass. 383.

In the case of the Lessee of Powell et al *v.* Harman, on a certificate of division of opinion of the judges of the circuit court of the United States, for the district of West Tennessee, the supreme court of the United States, at their January session, 1829, ordered to be certified to the said circuit court, "That a void deed is not such a conveyance, as that a possession under it will be protected under the statute of limitations." Peters' Rep. (Sup. Ct. U. S.) 241, 242.

In the case of Galatian et al *v.* Cunningham, on appeal, (8 Cow. Rep. 374,) WOODWORTH, J., said: "The question of confirmation applies only to the purchase by the trustee; that being a subject of confirmation. If the previous proceedings were fraudulent and void, it was incapable of confirmation. In Cok. Lit. 295, b., the doctrine is laid down, that a confirmation may make a voidable or defeasible estate good; but it cannot strengthen a void estate." 5 Vin. 389, (Y.) pl. 5 S. P.

In the case of Bromley *v.* Holland et al., (Cooper's Cas. in Ch. 24,) ELDON, Ld. Chancellor, said: "I do not see how a deed which is null and void is capable of confirmation."

A void lease is incapable of confirmation at law. Sinclair *v.* Jackson ex dem. Field, (in error) 8 Cow. Rep. 544, 548.

The purchaser of a real estate of a minor cannot avail himself of the prescription *brevi temporis*, if all the legal formalities were not observed in the sale. Francoise *v.* De La Ronde, 8 Martin's Rep. 619, 631. The court, speaking of the defendant's deed, said: "It purports to be a sale, made by a tutrix of the property of her ward, and as such is wholly or mal and illegal, the requisitions of the law cited not having been mplied with. The vendee saw most clearly that he was purchasing from one person the property of another."

The deeds which are absolutely void cannot be the foundation of title, or that a *cestui que trust* can claim nothing under a deed which is fradulently obtained by his trustee or agent acting under his authority, need not to be controverted. Brooks *v.* Marbury, 11 Wheat. Rep. 90.

Possession under a void execution was obtained by the attornment of the defendant's tenant: Held, that the attornment was void; that the possession thereby obtained was not adverse to the defendant, or his assigns: and must be held as the tenant held it, viz. as the tenant of the defendant, or his assignee. Hoskins *v.* Helme, 4 Littell's Rep. 310.

"There was another ground of defence mentioned and discussed upon the argument; and that was the existence of an adverse possession of twenty years, sufficient to toll the plaintiff's entry. From the time that Miller and the other tenants surrendered their possession to Taylor, to the time of bringing the suit, above twenty years had elapsed, and if the statute of limitations had begun to run from the time of that surrender, the lessors of the plaintiff would undoubtedly have been barred. But it did not begin to run, for reasons which I shall presently mention. It has been urged that there was a suspension of the statute by reason of coverture, rights in remainder, &c. This, however, is a mistake. There was no disability on the part of Lady Stirling, and she owned the whole estate in fee, under her husband's will, at the time of Taylor's entry. But the reason why the statute of limitations did not then begin to run against her, is this, that the surrender was not *of itself*, and without reference to the title of Taylor, a disseisin or ouster sufficient to set the statute in motion. There is no *fact*, found by the special verdict, amounting to an ouster, unless it be, what is termed in the case the attornment of the tenants in acknowledging to hold or accepting leases under Taylor instead of Lady Stirling. But, unless Taylor was lawfully entitled to the possession, this attornment could not, in any way, prejudice the rights of Lady Stirling, and it was, of itself, null and void." Jackson ex dem. Livingston et al. *v.* De Lancy and Russel, (in error,) 13 Johns. Rep. 552, 553; Per KENT, C. J.; *Et vide* Jackson ex dem. Van Beuren et al. *v.* Vosburgh, 9 Johns. Rep. 270, 277.

Where A.'s tenant, from year to year, takes a lease from B., the act is void, and cannot work an adverse possession against A. Jackson ex dem. Williams et al. *v.* Miller, 6 Cow. Rep. 751.

In the case of Jackson ex dem. Winthrop *v.* Waters, (12 Johns. Rep. 365,) the plaintiff produced the letters patent to Elkanah Dean, and others, issued by the Colonial Government of the Province of New York, dated the 11th of July, 1769, and made out a regular title, under that patent to lot No. 70. The possession of the defendant was admitted.

The defendant produced a writing, dated the 28th of June, 1768, from Francis Mackay, who claimed under a grant from the French Canadian Government, to one La Gauchetierre, prior to the conquest of Canada, by which one Jaques La Framboise was permitted to take two lots of land in Mackay's Seignory on Lake Champlain, and settle himself there. La Framboise had entered in 1763, by permission from Mackay, but did not continue long; and again in 1768, entered under the above writing from Mackay, and continued there until the American war, having cleared about twelve acres, when he left the premises; and again returned in 1794, and remained in possession until January 25, 1803, when he conveyed to Charles L. Sailley, in fee, all his right in the said lot No. 70, in Dean's patent. On the 17th of March, 1803, Sailley conveyed to the defendant in fee.

THOMPSON, C. J., delivered the opinion of the court, and after discussing the question of title, in conclusion, said: "The doctrine of this court with respect to adverse possession, is, that it is to be taken strictly, and not be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner. 9 Johns. Rep. 167. It must be hostile in its inception, and continued so for twenty years; and must be marked by definite boundaries. 1 Johns. Rep. 156; 2 Johns. Rep. 230. The possession held by La Framboise, prior to his conveyance to Sailley, in 1803, cannot be deemed adverse, if his original entry under Mackay, is not to be so considered, as it clearly is not, it being taken under a foreign government, which we must reject as a legitimate source of title. The plaintiff must, accordingly, have judgment."

"Deeds conveying the whole property of a person making them to a woman with whom he cohabited, without any proof of valuable consideration paid by her, she not having means to make such purchases, will be presumed to be void, as against creditors. The statute of limitations does not run in such cases." Buist & Rowand *v.* Smyth, Adm'r, &c., 2 Eq. Rep. (Desaussure's) 214.

A title void in itself, will prevent him in whose favor it was executed from pleading prescription. Dufour *v.* Camfranc, 11 Martin's Rep. 715. Frique *v.* Hopkins et al., 4 Martin's Rep. (N. S.) 224. Bonne et al. *v.* Powers, 3 Ib. (N. S.) 462.

The prescription of four years against minors, runs only against them for those acts where the forms of law have been pursued in the alienation of their property. M. & F. Gayoso De Lemos *v.* Garcia, 1 Martin's Rep. (N. S.) 324.

In the case of Rabineau *v.* Cormier, 1 Martin's Rep. (N. S.) 401. The court said: "Under the circumstances of error on the part of the vendor in delivering property not sold, and error on the part of the vendee,

in taking possession of that which he did not purchase, the question is, can the latter hold it by prescription? We think not. An important and indispensible requisite is wanting, to make out a title of the kind; the intention to possess. The vendee intended to enter into, and hold the property sold him. What he possessed over and above the quantity purchased, was in error."

"If the title under which the acquisition is made, be null in itself from defect or form, or discloses facts which show the person from whom it is acquired has no title, it cannot form the basis of this prescription; [*Prescriptio longi temporis,*] because the party acquiring must be presumed to know the law, and consequently wants the *animo domini*, which is indispensible in cases of this kind. But where the title is free from these defects, and the property is not transferred, by want of title in the party making the transfer, then it forms a good ground for the prescription; or, in other words, the inquiry is, whether the error be one of fact, or of law." L. & F. Frique *v.* Hopkins et al., 4 Martin's Rep. (N. S.) 224.

But where possession is taken and held under an instrument which is not void but only voidable, the prescription will run. So the testator's concubine may prescribe under his will, against his brothers and sisters. And the action of *inofficiosi testamenti*, by which they might avoid such will, is barred by the lapse of five years. Carrel's Heirs v. Caberet, 7 Martin's Rep. 375, 408.

Devise to trustees in fee, in trust to permit A. H. to receive the rents and profits for life; remainder to W. H. in tail; remainder to J. S. in fee; held, that a fine with proclamations, levied by W. H. to a stranger in the lifetime of A. H. was void; and therefore the heir of J. S. was not barred by non-claim and want of entry. Doe ex dem. James et ux. v. Harris, 5 M. & S. Rep. 326.

A sheriff's deed, which recites the execution under which the lands in dispute were sold, as having been tested and signed by the deputy clerk, shall enure as color of title. For although the constitution declares, that all writs shall bear teste and be signed by the clerks of the respective courts, yet a writ of execution is not necessarily void because it bears teste and is signed by a deputy clerk; because the act of 1777, ch. 2, sec. 95, provides that in the event of the death of the principal clerk; the deputy shall sue out writs and other process. Den ex dem. Jones *v.* Putney, 3 Murph. Rep. 562.

A grant of administration which was originally void, and not merely voidable, can acquire no validity from an acquiescence of twenty years, or any longer period. And the tenants who held under a conveyance from the administrator, executed upon a sale made twenty-six years before the trial, in pursuance of a license from the court, to sell the

whole real estate of the intestates to pay their debts, could not set up such conveyance and their possession under it in bar of the demandant's action. WILDE, J., in delivering the opinion of the court, said; "Nor can lapse of time render an act valid, which was originally void. *Quod ab initio non valet, tractu temporis non convalescit.*" It was also *held*, that the statute of Massachusetts, of 1817, ch. 190, § 12, by which actions to recover real estate sold by administrators, &c., on license, are limited to five years, applies only to sales made subsequently to the passing of the statute. Such a sale made previously to the passing of the statute, may be avoided after the lapse of twenty years. Holyoke *v.* Haskins et ex., 5 Picker. Rep. 20, 27.

In the case of La Frambois *v.* Jackson ex dem. Smith et al., (in error,) 8 Cow. Rep. 589, 605. COLDEN, Senator, said; "I admit, also, that if an adverse possession be claimed under a grant or conveyance which never could have been the foundation of a good title, it cannot bar the recovery of one who shows a perfect title."

And for this reason it is that statutes of limitations do not extend to cases of fraud; and that no act or deed, which is fraudulent, can be the foundation of an adverse possession; because being absolutely void, and not merely *voidable*, it cannot afford *color* of title; and without *color* of title, there is nothing whereby an *adverse possession* can be sustained.

"The common law of England abhors every species of covin and collusion." Roberts on Fraud. Conv. 520, ch. 5, sec. 1.

"So general, indeed, is the condemnation of all fraudulent acts by the law of England, that a fraudulent estate is said in the masculine language of the book, to be no estate in the judgment of the law. It forfeits the protection of every statute which gives confirmation to doubtful titles, and while a disseisor has the benefit of the statutes of fines and limitations in support of his wrongful title, a title acquired by covin is indefinitely open to be disputed, and even acts, as well *judicial* as others, which of themselves are just and lawful, if infected with fraud, are in judgment of law vitious and unavailing; for the maxim is *quod alias bonum et justum est, si per fraudem petatur, malum et injustum efficitur.* All the partialities of the law expire under its antipathy to fraud." Ib.

"According to the greatest authorities a *covinous* conveyance of land is as *no* conveyance *as against* the interest intended to be defrauded, and ought, by the rules of good pleading, *so* to be treated, where a party is seeking to avail himself of the protection of the statutes of fraudulent conveyances, for the maxim is *pro possessore habetur qui dolo desiit possidere.*" Ib. 596.

Length of time may bar an equity, twenty years' possession bars an equity of redemption; but no time can cover a fraud. "It is true that in cases of fraud no time can cover the fraud." Pickering *v.* Lord Stamford, 2 Ves. Jun. 280.

A title in whatever manner perfected, if obtained by fraud is void. Galatian *v.* Erwin, 1 Hopkins' Ch. Rep. 48, 55. Smithwick et al. *v.* Jordon, 15 Mass. Rep. 113. Jackson ex dem. Gilbert *v.* Burgott, 10 Johns. Rep. 457, 461. Brooks *v.* Marbury, 11 Wheat. Rep. 90. Livingston *v.* Hubbs et al., 2 Johns. Ch. Rep. 512. Boyd *v.* Dunlap, 1 Johns. Ch. Rep. 482. Wendell *v.* Van Rensselaer, Ib. 350. Bright Exr. *v.* Eynon, 1 Burr. Rep. 395. Gubbins *v.* Creed, 2 Sch. & Lefr. 223. Carew *v.* Johnston, Ib. 307. Kennedy *v.* Daly, Ib. 355, 375, 379, 380. Gifford *v.* Hart, 1 Ib. 386, 409.

"In Fermor's Case, 3 Co. 77, it was resolved that a fine levied by fraud was not binding, 'and that such fraudulent estate was as no estate in judgment of law,' and it was declared that all acts and deeds, judicial as well as extra judicial, if mixed with fraud were void." Jackson ex dem. Gilbert *v.* Burgott, 10 Johns. Rep. 463. Per KENT, Ch. J., delivering the opinion of the court.

Fraud will vitiate any contract. Wilson *v.* Foree, 6 Johns. Rep. 110. Whelan *v.* Whelan, 3 Cow. Rep. 537. Seymour *v.* Delancey, 3 Cow. Rep. 445. Murray *v.* Palmer, 2 Sch. & Lefr. 474. Bliss et al. *v.* Thompson, 4 Mass. Rep. 488. Carroll et al. *v.* The Boston Marine Insurance Company, 8 Ib. 515.

Where a conveyance of lands was obtained by fraud and imposition, and the same was acknowledged and recorded, and possession taken by the grantee, it did not operate such a disseisin as disabled the grantor afterwards to devise the estate. Smithwick et al. *v.* Jordon, 15 Mass. Rep. 113.

A grantee under a fraudulent conveyance cannot acquire a title by possession against the creditors of the grantor. Beach *v.* Catlin, 4 Day's Rep. 284.

In this case, page 294, SWIFT, J., said: "The other question is, whether the defendant can protect himself by the possession of fifteen years under the statute concerning the possession of lands. It is unnecessary to consider the question whether fraud will take the question out of the statute: for I apprehend, on a sound construction, it will be found neither to be embraced by the words, nor comprehended within the meaning of the statute; and it would be a new idea to construe a statute liberally for the protection of frauds."

It is generally true that a man shall not be received to aver against his own deed. But the case of fraud is always excepted which vitiates

every transaction; and a deed obtained by fraud is to be considered as a void contract as to the fraudulent party. Bliss et al. *v.* Thompson, 4 Mass. Rep. 492.

In the case of Kirk et al. *v.* Smith, ex dem. Penn, (in error,) 9 Wheat. Rep. 241, 288, MARSHALL, Ch. J., delivered the opinion of the court; in speaking of "those rules which apply to acts of limitation generally," he said: "One of these which has been recognised in the courts of England, and in all others where the rules established in those courts have been adopted, is, that possession to give title must be adversary." And he added: "To allow a different construction, would be to make the statute of limitations a statute for the encouragement of fraud—a statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such construction."

And it matters not, whether a fraud be committed against a party to the fraudulent transaction, or against third persons, not parties thereto.

An agreement may be infected with fraud by being a deceit on other persons not parties to that agreement. "Particular persons in contracts shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect to other persons, who stand in such a relation to either as to be affected by the contract or the consequences of it." Earl of Chesterfield et al. *v.* Sir Abraham Jansen, 2 Ves. Sen. Rep. 156. And vide Whelan *v.* Whelan, 3 Cow. Rep. 537.

"'Whether a transaction be fair or fraudulent,' is often a question of law; it is the judgment of law, upon facts and intents. The indemnity, which is the consideration of the deed in question, I allow to be a good, valuable and true consideration: and I allow this deed to be a valid transaction, as between the parties. But valid transactions, as between the parties, may be fraudulent by reason of covin, collusion, or confederacy to injure a third person: for instance—A. buys an estate from B. and forgets to register his purchase deeds: if C., with express or implied notice of this, buys the estate for a full price, and gets his deed registered: this is fraudulent, because he assists B. to injure A. Or, if a man, knowing that a creditor has obtained a judgment against his debtor, buys the debtor's goods for a full price, to enable him to defeat the creditor's execution; it is fraudulent. Again, if a man knowing that 'an executor is wasting and turning the testator's estate into money, the more easily to run away with it,' buys from the executor, with that view, though for a full price; it is fraudulent." Sir Edward Worseley et al., Assignees, &c. *v.* De Mattos & Slader, 1 Burr. Rep. 474. Per LORD MANSFIELD, delivering the opinion of the court.

Nor is the investigation of fraud, exclusively confined to courts of equity; courts of law have, also, jurisdiction in such cases. The difference is, that at law, fraud must be proved; in equity it may be presumed.

"Courts of equity, and courts of law, have a concurrent jurisdiction, to suppress and relieve against fraud. But the interposition of the former, is often necessary for the better investigating truth, and to give more complete redress." Bright, Ex'or, &c. *v.* Eynon, 1 Burr. Rep. 396. Per LORD MANSFIELD, *et vide*, 3 Black. Comm. 431, 437, 439. Boreing *v.* Singery, 3 Har. & M'Hen. Rep. 404.

"With respect to fraud, the distinction between legal and equitable jurisdiction is this; that at law it must be proved, not presumed; so that equitable jurisdiction may be exercised, when a court of law could not enter into the question. 18 Ves. 483. A variety of cases have been decided, and relief afforded in equity, where, from the nature of the transaction and the situation of the parties, fraud and imposition might be presumed." 3 P. Wm. 139. Pow. on Con. 31. Galatian et al. *v.* Cunningham, (on appeal,) 8 Cow. Rep. 370. Per WOODWORTH, J.

"Courts of law as well as of equity have cognizance of fraud, but courts of law relieve against it negatively, by inquiring into circumstances, and not permitting plaintiffs to recover in actions brought on deeds or contracts fraudulently obtained, and thus virtually annulling such deeds or contracts as against the fraudulent parties." Lamborn *v.* Watson, 6 Harr. & Johns. Rep. 242, 255. Per BUCHANAN, Ch. J., delivering the opinion of the court.

"Fraud will invalidate, in a court of law as well as in a court of equity, and annul every contract and every conveyance infected with it." Jackson ex dem. Gilbert *v.* Burgot, 10 Johns. Rep. 462. Per KENT, Ch. J., delivering the opinion of the court. *Et vide* Bright, Ex.'or, *v.* Eynon, 1 Burr. Rep. 367; Beach *v.* Catlin, 4 Day's Rep. 293; Merrill *v.* Meachum, 5 Day's Rep. 344.

"Fraud will *invalidate* in a court of law as well as in a court of equity. We all remember the case of Wyndham *v.* Chetwynd, (P. 1775, 28 G. 2,) in this court, where the court directed the jury to find '*non divisavit*,' though there was a *devise in fact;* but in was *obtained by fraud*, and, therefore, considered as no devise at all." Bright, Exr., &c., *v.* Eynon, 1 Burr. Rep. 397. Per FOSTER, J.

A person claiming under the grantor of a deed, but claiming against the deed, is not precluded from showing that it was obtained by fraud. BUCHANAN, Ch. J., in delivering the opinion of the court, said: "The whole of the evidences set out in the third bill of exceptions, was expressly offered for the purpose of showing that the deed from Zachariah and Harriet Tucker to Soper, the defendant, was fraudulently obtained, and was all suffered to go to the jury, as the proper tribunal to determine the question of fact." Hurn's Lessee *v.* Soper, 6 Harr. & Johns. Rep. 276, 281.

Statutes of limitations only take place from the time the right of action accrues; and if there be fraud, from the time of its discovery. Jones *v.* Conoway et al., Ex'.rs, &c., 3 Yeates' Rep. 109.

In the case of Riddle *v.* Murphy et al., (7 Serg. & R. Rep. 235,) GIBSON, J., delivering the opinion of the court, said: "The court, very properly, charged that, if the sale was fraudulent, the act begun to run against the devisees of Cornelius Murphy, or those who represented them, only from the time the fraud became known to the person then having title."

But, a *bona fide* purchaser for a valuable consideration from a fraudulent grantee, if unaffected with notice either actual or constructive, will, at law, be protected. Dexter *v.* Harris, 2 Mason's Rep. 536. In this case, STORY, J., delivering the opinion of the court, said: "There is no such principle of law as that what is matter of record shall be constructive notice to the purchaser. The doctrine upon this subject, as to purchasers, is this, that they are affected with constructive notice of all that is apparent upon the face of the title deeds, under which they claim, and of such other facts as those already known necessarily put them upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to their knowledge. But of other facts, extrinsic of the title, and collateral to it, no constructive notice can be presumed; but it must be proved."

But, *defective* conveyances, which are not absolutely void, may, in certain cases, be the foundation of an adverse possession; as, where the occupant, or those under whom he claims, were *bona fide* purchasers; and especially, if such defective conveyance were received from the lessor of the plaintiff, or any person from, through, or under whom the lessor claims the beneficial title.

In the case of Jackson ex dem. Vanderlyn & Betis *v.* Newton et al., (18 Johns. Rep. 355,) the lot, of which the premises in question were part, was patented to Timothy Church, in July, 1786. In the year 1797, Joshua Newton went into possession of the premises, under a contract for the land with Eleazar Church, son of Timothy Church; on the 19th of February, 1798, Joshua Newton received from Timothy Church, a deed for the premises, which had no actual seal, but a flourish at the end of the grantor's name, with the letters "L. S.," made with a pen. When the deed was executed, it was said there was no wax or wafers, and that a flourish with a pen was equally good; Joshua Newton paid a part of the consideration money down, and gave a mortgage for the residue, which he afterwards paid and took up. The defendants were *bona fide* purchasers under him, and he and they had held the uninterrupted possession, until the commencement of the ejectment suit, in May term, 1818.

In the year 1800, James and William Anderson recovered a judgment against Timothy Church, and issued an execution, by virtue of which the lot containing the premises in question was sold to the said James and William Anderson, who received a sheriff's deed therefor, bearing date, June 4th, 1801. On the 19th July, 1808, John Taylor recovered a judgment against William Anderson, which was revived, by *scire facias*, against his heirs and terre-tenants, and the record thereof, docketed 8th August, 1817; upon which, a *fi. fa.* issued, by virtue whereof the said lot was sold to the lessors of the plaintiff, who received a deed therefor from the sheriff of the county of Chenango, dated October 11, 1817.

It was held, that the defendant's possession was adverse to the lessors of the plaintiff, and sufficient to defeat the suit.

In the case of Strange *v.* Durham, (2 Bay's Rep. 429,) it appeared that the land in dispute was granted to the plaintiff's father, more than twenty years before; that the father was dead, and that the plaintiff was his heir in law. The defendant offered in evidence a conveyance made by the plaintiff's attorney, one Andrew Kidd, under which deed he claimed; but, as the power was a joint one to the attorneys, four in number, and only one of them had made the deed, an exception was taken to it, on the trial, as nugatory in itself, which was sustained by the presiding judge, Trezevant. The defendant subsequently relinquished all claim under his deed from Kidd, the attorney of the plaintiff, and rested solely on his possessory right under the statute of limitations. Against this right of possession, it was alleged that, as the defendant went into possession of the land by virtue of this purchase and deed from Kidd, which he knew to be defective, he could not afterwards relinquish his claim to it, and set up title by possession only, though it was admitted he might have done so, if he had not accepted this conveyance. And of this opinion was the presiding judge, in his charge to the jury; but they found a verdict for the defendant. Upon a motion for a new trial, on the ground of the verdict's being against law, and the charge of the judge who tried the cause, all the other judges concurred in opinion, however, that there should not be a new trial, as it could not vary the plaintiff's right of action, whether the defendant knew that his title was good or bad. It did not depend on the defendant's knowledge or ignorance of the plaintiff's title, but on the statute, which had expressly taken away the plaintiff's remedy, unless his action had been commenced within five years from the time of defendant's entry upon the land.

In the case of M'Koy *v.* The Trustees of Dickinson College, 5 Serg. & R. Rep. 254, it was held, that a commissioner's deed under their common seal was no evidence of title: but that it was evidence for the purpose of showing that one who was proved to have been in possession, held adversely to the plaintiff in a case where the defendant relies on the statute of limitations as a defence.

In the case of Jackson ex dem. Roosevelt et al. *v.* Wheat, 18 Johns. Rep. 40, the plaintiff claimed title under the Minisink patent. The defendant set up in his defence, a title by possession, and also that the lot occupied by him was not within the bounds of the Minisink patent.

John Gillet, a witness, testified, that the defendant had lived on the premises about forty years; that William Gillet, uncle to the witness, was the first occupant of the next lot east in Deerpark. That the defendant bought of William Gillet; but witness did not know whether defendant had a deed: that William Gillet had a deed, and the witness supposed the defendant had one. William Gillet claimed title under the Minisink patent, and purchased of Henry Wisner, one of the proprietors.

The plaintiff called on the defendant to produce the deeds mentioned by the witness, which he refused to do, and they were not produced.

The defendant then offered to prove that the premises were not contained within the bounds of the Minisink patent, which evidence being objected to, was overruled by the judge.

"*Per Curiam.* 1. The possession of the defendant was, undoubtebly, adverse: it has been continued for a period of between 40 and 50 years, under a claim of title, by purchase from Gillet who had a deed. It was not necessary to produce the deed though called for by the plaintiff. Suppose the deed had been lost, or when produced was found to be defective, that could not have destroyed the effect of the defendant's possession. In Smith *v.* Lorillard, 10 Johns. Rep. 356, KENT, Ch. J., said, "that after a continued possession for twenty years, under pretence or claim of right, the actual possession ripens into a right of possession which will toll an entry; and in Smith *v.* Burtis, 9 Johns. Rep. 180, SPENCER, J., said, (VAN NESS, J., and YATES, J., concurring,) that "it had never been considered necessary to constitute an adverse posesssion, that there should be a rightful title. Whenever this defence is set up, the idea of right is excluded; the fact of possession, and the *quo animo* it was commenced and continued, are the only tests;" and in Jackson *v.* Ellis, 13 Johns. Rep. 120, the court said, that it had been repeatedly ruled in this court, that an entry under claim or color of title is sufficient to constitute an adverse holding. It is not necessary, for this purpose, that the title under which the entry is made, should be a good and valid title. 2 Caines, 183.

Though the possessor claim under written evidence of title, and on producing that evidence, it proves to be defective, yet the character of his possession, as adverse, is not thereby affected. If the entry is under color of title, it is sufficient; the possession will be adverse. The fact of possession, and its character, or the *quo animo*, are the test. La Fromboise *v.* Jackson ex dem. Smith et al. (in error,) 8 Cow. Rep. 589.

In the case of Hampton's Lessee *v.* M'Ginnis, 1 Tenn. Rep. 286, it was held, that where the defendant had been in possession for seven years under color and claim of title, it was not necessary to show a regular chain of conveyance to himself from the first purchaser, under

whom he claimed title, and who held under a county warrant, but had conveyed the premises, by deed, before he had obtained that warrant, to one from whom the defendant deduced a regular chain of title. *Et vide*, Craddock's Lessee *v.* Stalcup, 1 Tenn. Rep. 351; Sawyer's Lessee *v.* Shannon et al., Ib. 465.

"If a person takes a grant or conveyanee from one having, himself, a bad or defective title, the title is also *prima facie,* bad or defective, in the hands of the grantee. If it be not so on account of his being an innocent and *bona fide* purchaser without notice, it is for him, or those claiming under him, to maintain that he was such purchaser without notice; and if he, or those claiming under him, do not do so, witnesses shall not be permitted to do it for them." Gallatian et al. *v.* Cunningham, (on appeal,) 8 Cow. 382; Per COLDEN, Senator.

Conveyances good in point of form, and professing to convey the entire title, although executed by a grantor, who has not a good title, or even no title at all, are, notwithstanding, a sufficient foundation for an adverse possession, where the grantee is a purchaser for a valuable consideration; and has no notice, either actual or constructive, from the face of his deed, from the deeds through which he deduces his title, or from any other source, of the existence of a better title.

Letters patent, bearing date the 13th September, 1790, for lot No. 7, in Ovid, were granted to Jacob Van Gelder, a deceased soldier, who died the 18th January, 1779, leaving nine children, Jacob, Rueben, William, Elijah, Mary, Abigal, Elizabeth, Mercy and Sally. Rueben Van Gelder, one of the children of the patentee, on 13th of Obtober, 1791, executed to Stephen Thorne, a deed for the entire premises, styling himself administrator and heir of Jacob Van Gelder. On the 14th February, 1794, Stephen Thorne executed a deed for the same premises to Peter Smith; and on the 8th December, 1807, Peter Smith executed a deed for the premises to the defendant.

On the 7th January, 1792, Jacob, William and Elijah, three of the children of the patentee, executed a quit claim deed to Reuben Van Gelder, for the premises. On the 22d January, 1812, Sarah, Mercy, Mary and Abigal Van Gelder, and Elizabeth Wichill, the five other children of the patentee, executed a quit claim deed of the premises to Reuben Van Gelder; and on the 19th August, 1813, Solomon Van Gelder, the husband of Mercy; Elijah Van Gelder, and Joseph Van Gelder, the husband of Mary, executed a deed of the premises to Reuben Van Gelder.

Elijah Van Gelder, David Van Gelder, and Abigal, his wife; Solomon Van Gelder and Mercy, his wife; Elizabeth Philo, Sally Van Gelder, and Joseph Van Gelder and Mary, his wife; executed to William Preston, a deed of the premises bearing date the 13th February, 1798.

Jacob, William and Elijah Van Gelder, executed a deed of the premises bearing date the 15th March, 1798, to William Preston. On the 4th

October, 1798, William Preston executed a deed of the same to David Matthews, who, by his will dated 29th August, 1810, devised an undivided moiety to John Matthews, his only son, and the residue to his said son, and Robert Morris and Gerrit Wendell, *in trust*, for certain purposes stated in the will.

When Preston first attempted to purchase the lot from the heirs of the deceased soldier, he was told that Reuben had sold the lot to Thorne. The witness saw Thorne pay money to Reuben, and all the other heirs received a share of the money; but the witness did not know whether they were present at the sale to Thorne.

The court held that there was an *adverse possession* which protected the defendant, and said: "The conduct of Reuben, subsequently to the conveyance made by him, confirms in a great degree, what has been stated to have been the intentions of all the parties when it was executed. The consideration received was divided between all the children. They, therefore, supposed the sale, made by Reuben, sufficient to pass the entire lot, or they never would have accepted of their proportion of the consideration received for it; and Thorne, supposing himself to have obtained a good title, did not hesitate to dispose of it to a person who entered as owner of the whole lot.

If, therefore, it is conceded that Reuben's deed conveyed one-ninth part only to Thorne, and that if he had entered under it, such entry would have been according to his right as tenant in common, and that his co-tenants would not have been disseized, because the possession would not have been adverse to their rights, still this cannot change the character of the defendant's possession, nor the previous possession of his father. Neither of them had any knowledge of this deed. The father purchased by warranty deed from Thorne, who represented himself to be the sole proprietor of the lot. As early as July or August, 1792, while the defendant's father was on the lot, Thorne went to view it, and avowed himself to be the owner, and sold it for £140. From that period, in strictness, the adverse possession commenced. At all events, it commenced from the date of Thorne's deed to the elder Smith, which was in February, 1794. It is evident, therefore, that the doctrine, in relation to the possssion of tenants in common, does not apply to this case. It might as well be urged as applicable to a conveyance made by a stranger, of any lands held in common. And it will not be questioned, that the possession of a purchaser under such a deed, given without right on the part of the grantor, would, notwithstanding, be adverse to the rightful owners, although held by them in common. But, in the present case, no such tenancy did, in fact, exist." It was also held that the adverse possession of Smith, the grantee of Thorne, was sufficient to defeat the conveyances obtained by William Preston, in 1798. And that the conveyances executed by all the children of the patentee to Reuben, must enure to the benefit of the defendant, who held under Reuben, through Thorne. Jackson ex dem. Preston et al. *v.* Smith, 13 Johns. Rep. 406, 412, 413.

Five years' actual adverse possession of a tract of land under a junior grant will give the tenant a title to so much as he has in actual possession, even against a person who has a paramount title, and is in the constructive possession of the part in dispute. Middleton *v.* Dupois, 2 Nott & M'Cord's Rep. 310.

So in the case of Jackson ex dem. Belden et al. *v.* Thomas, 16 Johns. Rep. 293, where the plaintiff claimed the premises in question as part of the Minisink patent, the question of title depended on the adjustment of the boundary lines of that, and of four contiguous patents, viz.: John Evans' patent, Bridge's patent, Holcomb's patent, and White's patent. On the trial the defendant proved that part of the premises was within White's patent, and all the land covered by this patent was relinquished on the trial by the plaintiff. The defendant also proved that of the residue of the premises he had been in possession for more than twenty years, as a purchaser from Holcomb; and that Holcomb, after obtaining his patent, and several years before the defendant's purchase from him, had taken possession of the same, claiming it as included within the bounds of the said patent. It was decided, however, by the court, that this part of the premises lay within the lines of the Minisink patent, and therefore belonged to the lessor of the plaintiff. But the defendant had judgment on the ground of his adverse possession; and SPENCER, Ch. J., who delivered the opinion of the court, said: "It appears to me, that an adverse possession is abundantly made out. When the patent was granted to Holcomb, he did not live on the premises in question; but ever since the granting of the patent, that part of the premises not included in White's patent, have been held by Holcomb, and those who have purchased of him: and the fact is proved, that the defendant is in possession claiming title under Holcomb's patent, and he certainly entered into possession since the granting of the patent to Holcomb, for his possession has been for twenty or twenty-five years." "If the defendant was not in possession when Holcomb's patent issued, and the case shows he was not, and if the premises have been held ever since that patent issued, by Holcomb, and those claiming under him, then the defendant's possession was, in its inception, adverse.

"The principle, however, that the possession must in its inception be adverse, and continue so, is not well understood. In those cases in which that observation occurs, nothing had happened to change the character of the first possession, and that was considered as denoting *quo animo* the possession was held after the first entry.

"If one enter on land without any title or claim, or color of title, the law adjudges the possession to be in subservience to the legal owner, and no length of possession will render the holding adverse to the title of the owner; but if a man enters on land, without claim or color of title, and no privity exists between him and the real owner, and such person, afterwards, acquires what he considers a good title, from that moment his possession becomes adverse. I am not sensible that the court have ever held a contrary doctrine.

"In the present case, even Holcomb was not in possession of these premises when his patent issued, though he entered immediately after. It appears to me that an adverse possession for a sufficient length of time to bar the plaintiff's right of entry, is clearly established by the evidence."

It will be seen from the facts of this case, that a great part of the above opinion is merely hypothetical, and had no immediate relation to the question before the court; as the court unhesitatingly decided that the possession set up by the defendant, "was, in its inception, adverse," the discussion of the question, whether a possession, in its origin, "in subservience to the legal owner," could by any and what subsequent event, be converted into an adverse possession, seems to have been uncalled for in the decision of the cause; and consequently the opinion expressed on that point would appear to have only the authority of a *dictum*. But it has since been incidentally recognized as authority; and the extent and meaning of those observations of Chief Justice SPENCER, have been limited and defined. It is also to be remarked, that the qualifying words, "and no privity exists between him and the real owner," materially restrain that generality of expression which would otherwise conflict with the settled course of decision in that court; it is not to be imagined, that such was the intention of the chief justice.

In the following case of Jackson ex dem. Ten Eyck et al. *v.* Frost, 5 Cow. Rep. 346, the supreme court have explained the meaning of the expressions used by the chief justice in the above case.

One ground of defence insisted upon at the trial, was that of an adverse possession; in support of which, the defendant "proved that one M'Alpin occupied the premises in question in 1795, claiming them as his own, saying they were in a gore; which therefore belonged to the settlers; that M'Alpin was in possession twenty-five years before the trial, and more than twenty years before the suit was commenced; that about twenty-five years before the trial, he exchanged farms with one Miller, now deceased."

The defendant offered to show, by Miller's declaration, that he had a deed from M'Alpin; which evidence was objected to, and excluded by the judge.

The defendant then proved that Miller remained in possession twelve or fifteen years, whence the possession passed through several hands down to the defendant.

The widow of Miller swore that when her husband exchanged with M'Alpin, he took a quit-claim deed from M'Alpin, who said he thought he had a good title; that no rent had been claimed or called for; and the premises in question were not included in any of the patents; that this was twenty-seven years before the trial; that she could not read; did not see any deed executed; but M'Alpin agreed to give one; and her husband had a paper which he said was a deed from M'Alpin.

The judge charged that the plaintiff had made out a sufficient title and location, and that the defendant had failed in establishing a bar by adverse possession.

The opinion of the court was delivered by SAVAGE, Ch. J., who, in reference to the defence of adverse possession, said:

"The defendant, or those under whom he claims, have had possession for a sufficient length of time. The only difficulty is, as to the character of that possession. Was it adverse? M'Alpin was the first possessor; he claimed it as his own. Why? It was a gore: no rent had been demanded; and it, of course, belonged to the settlers. This amounts to saying that he claimed it because he had no title; for if it was a gore, then the land belonged to the state. The idea that rent could be demanded, pre-supposes a landlord, and of course an owner. The deed to Miller was given with this parol abstract of the title; it was not that he owned the land, because the fee was vested in him by purchase or descent; but was his because there was no other owner, this is no title on which to rest an adverse possession. The purchaser, who took such a deed, knew that what he possessed amounted to nothing; for he was bound to know it.

"I am aware that it was said in the case of Jackson *v.* Thomas, 16 John. 301, that 'if a man enters on land, without claim or color of title, and no privity exists between him and the real owner, and such person afterwards acquires what he considers a good title, from that moment his possession becomes adverse.' This doctrine must not be understood as authorizing the purchaser to *consider* a naked possession a good title. It must be, as I understand the law, such a title as the law will, *prima facie*, *consider* a good title. Otherwise there would be no uniformity. The character of the possession might be made to depend upon the understanding of the tenant, and the same possession which would be a good defence to one, would be worthless to another. And hence a possession under a French grant was held not to be adverse, because such a grant could not possibly be the source of a good title.

"The possession of Miller, therefore, seems to me to be merely a continuation of M'Alpin's possession, with no greater rights, but precisely the same character. Admitting, therefore, that the possession of Miller's grantee was adverse, the length of time is not sufficient to bar the plaintiff."

The defendant and those under whom he claimed, had been in actual possession of the land in controversy, for more than twenty-five years, under a color and claim of title, by deed; *held*, that the lessors of the plaintiffs were barred; all their disabilities having ceased more than seven years before the commencement of the suit. Doe ex dem. Pritchard et al. v. Sawyer, 1 Hawk's Rep. 337.

"The rule *caveat emptor*, applies only to purchasers of defective *legal* titles. A purchaser of the legal title is not to be affected by any latent equity, whether founded on trust, fraud or otherwise, of which

he has not actual notice, or which does not appear in some deed necessary in the deduction of the title, so as to amount to constructive notice." Wilcox *v.* Calloway, 1 Wash. Rep. 41. *Et vide* Hooe & Harrison *v.* Pierce, Admr., Ibid, 217.

In the case of Dexter *v.* Harris, 2 Mason's Rep. 536, STORY, J., delivering the opinion of the court, said; "The doctrine upon this subject as to purchasers is this, that they are affected with constructive notice of all that is apparent upon the face of the title deeds, under which they claim, and of such other facts as those already known necessarily put them upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to their knowledge. But of other facts extrinsic of the title, and collateral to it, no constructive notice can be presumed; but it must be proved."

The statute of limitations will not run in favor of a purchaser for valuable consideration, who had knowledge of the rights of the parties, nor where he held as tenant in common, and during the minority of the other party. Saxton et ux. *v.* Barksdale et al., 4 Eq. Rep. (Dess.) 522.

A defendant in ejectment being in possession of the land for which the suit is brought, holding the same by a title adverse to that of the plaintiff for twenty years or more, is not necessarily entitled to a verdict. Bowie *v.* O'Neale et al., Lessee, on appeal, 5 Harr. & Johns. Rep. 226. In this case the defendant held as devisee under the will of a husband, the lands in question, which were the property of the devisor's wife; it was held, that such a possession could not create a presumption of title, or prevent the recovery of those deriving title under the wife.

Only an innocent purchaser, obtaining the title without notice, will be protected in equity. A volunteer cannot occupy more favorable grounds than his principal. Rearden *v.* Searcy's Heirs et al., 3 Marsh. Rep. (Ky.) 542, 543.

In the case of Jackson ex dem. Sitzer *v.* Waltermire, 7 Cow. Rep. 353, 357, the plaintiff brought ejectment for dower set-off to his lessor as the widow of Frederick Sitzer, in the farm possessed by the defendant. The plaintiff proved that the lessor's husband resided on the farm in question, and used it as his own during the coverture, that he died the last day of April, 1821. The defendant gave in evidence a deed from Frederick Sitzer in his lifetime, dated November 16th, 1785, by which Sitzer granted, &c., and quit claimed to A. Wilcox, his heirs and assigns, all his [S.'s] right, title, &c., of, in, and to the possession and improvements of the farm in question. Sitzer covenanted in this deed, that he was then truly and lawfully possessed of the premises, as the same were truly granted. From Wilcox, the possession of the land

passed through several hands to the defendant, who was in possession when this suit was brought.

SAVAGE, Ch. J., delivering the opinion of the court, said: "The testimony of the defendant consists of the facts stated by Halstead; that he purchased the possession of fifty acres of the same lot; and of the deed from Sitzer to Wilcox. By this deed, Sitzer conveys to Wilcox, his heirs and assigns, all the right of the grantor, to the possession and improvements of the farm in question; and covenants that he is lawfully possessed of the premises, as the same are truly granted.

"This deed is one link in the chain of the defendant's title. The farm has been held under it ever since its date, November 16th, 1785; and without doubt the defendant is protected by that deed, and his possession under it, from the claims of any person, upon the facts as they appear in this case. It was not accompanied with any declarations, as in Jackson *v.* Frost, 5 Cow. 346, which showed the absence of right or title. The grantor conveys the possession for ever. He does not say that he conveyed a fee; but such must have been the intent. The deed is inartificially drawn; and if we apply the rule laid down by Lord Mansfield, Cowp. 600, 'that the deeds shall operate according to the intention of the parties, if by law they may,' there can be no doubt that it carried a fee. The intention of the grantor was, to pass his title; and he supposed himself to have an estate of inheritance. *Et vide*, 3 Dall. 477."

Judgment for the plaintiff.

In the case of Alexander et al. *v.* Pendleton, 8 Cranch's Rep. 461, MARSHALL, Ch. J., delivering the opinion of the court, said: "But as the contract does not appear on the title papers, but was verbal, a purchaser for a valuable consideration, could not be affected by it unless he was a purchaser with notice. Finding Parthenia Dade in the quiet and undisturbed possession of four hundred acres of land, forming a parallelogram, limited on the west by the line north 6 west, he had a right to consider that line as established, so far as respected the land of Parthenia. He was not bound to know that a private parol agreement existed, which would control the possession. The trust, therefore, no more passed with the land to Hartshorne, than would any other secret trust of which he had no knowledge."

"The various suits which have been instituted by, and against the ancestors of the appellants cannot affect this cause. A suit not prosecuted to a decree or judgment is not constructive notice to a person not a *pendente lite* purchaser; and were the law otherwise, those suits, until that instituted in 1796, would convey no notice of the private agreement made in 1741. A knowledge of the suits, therefore, would not imply a knowledge of the trust; and possession for fifty years, though with knowledge of a better title, if adversary, constitutes a good defence against that title.

"In 1796, Charles Alexander instituted a suit against sundry persons

claiming the land in controversy for the purpose of altering the boundaries which had been held by Parthenia, and those claiming under her, from the year 1732, and which had been surveyed under an interlocutory decree made by the court of chancery, in the year 1741. In defending themselves against this claim, the purchasers of this land had a right to unite the possession of Parthenia Dade to their possession, without being affected by a secret trust of which they had no notice."

Where the tenant in tail had executed a conveyance in fee, and his grantee had entered and remained in peaceable and undisturbed possession more than seven years after the death of the grantor, and the plaintiff being under no disability. Held, that the possession was protected by the statute of limitations. Wells *v.* Newbold, Taylor's Rep. 197.

Instruments which do not purport to convey title, as leases, contracts, &c., cannot be on the foundation of an adverse possession.

In the opinion delivered by JONES, late Chancellor, in the case of La Fromboise *v.* Jackson ex dem. Smith et al., in error, 8 Cow. Rep. 589, 596, he *held*, that a claim under an executory contract to convey lands, the consideration being paid, and such contract therefore being capable of being specifically enforced, in equity against the vendor, might be a sufficient claim under color of title to constitute an adverse possession within the statute of limitations; he said: "The writing produced, admitting it to be simply a contract for a conveyance, is in accordance with the possession he [*the defendant*] held, and the claim of title under it." "It was an express agreement by a person claiming to have the right to contract for the disposal of the land, to convey to him the lot he should locate, when conveyances were to be given, and an agreement that he should enter into immediate possession, and hold the premises thus contracted to be conveyed to him, without rent, until the conveyance should be given.

"Under such an agreement, reduced to writing, and followed up by possession and improvements, the defendant acquired a title in equity to the land, if Mackay, the party contracting to convey, had at the time, or afterwards, acquired the right or power to perform his agreement. It was a contract which equity would have enforced the performance of, and the right of La Fromboise under it was the more perfect and stable, as the consideration had obviously been already paid or satisfied by him to Mackay, and there was nothing further to be done by him to entitle him to a conveyance of the legal title." And he adds, page 620.

"Whatever the right of Mackay was, if La Fromboise went into possession, supposing it to emanate from a legitimate source, and in confidence that his contract entitled him to a conveyance, and that Mackay had the right to give the conveyance he promised, his possession would

be adverse, notwithstanding his confidence was misplaced, and the title of Mackay, under whom he entered, was invalid. Whether a grant of the land under the authority of the French government, prior to the conquest of Canada by the British, would vest any title in the grantee, or confer on him the right under the treaty of Paris to a patent from the English government, either absolutely or upon terms, are questions which I consider it unnecessary and improper now to discuss. I assume that whatever right Mackay supposed himself to have to the land, no evidence appearing to the contrary, he founded upon some title or claim to a title under the colonial government; and his assuming to be entitled, and contracting to convey, gave to the purchaser under him a color of title, which would characterize the possession of such purchaser under such contract, as adverse against all other claimants."

But this was the *only* opinion expressed, as to the effect of a claim of *equitable* title as a foundation of an adverse possession. It is the *legal*, and *only* the legal title or claim, which is brought in question in an action of ejectment; a mere *equitable* title or claim will avail neither the plaintiff nor defendant. *Vide ante*, page 32, and notes thereto. Jackson ex dem. Potter *v.* Sisson, 2 Johns. Cas. 324. Jackson ex dem. Smith et al. *v.* Pierce, 2 Johns. Rep. 221. Jackson ex dem. Simmons et al. *v.* Chase, Ib. 84, 86. Jackson ex dem. Whitbeck et al *v.* Deyo, 3 Johns. Rep. 422, 423. Jackson ex dem. Kemball v. Van Slyck, 8 Johns. Rep. 380. The *color and claim of title*, in cases of adverse possession, however defective it may be, must still, according to all the cases hitherto adjudged, be a *color and claim of legal* title; and not a claim of a mere *equity*.

A mere equity can neither maintain nor bar an ejectment. Gilpin *v.* Davis, 2 Bidd's Rep. 416.

And the title under color of which the adverse possessor holds, must be adverse to, and different from, that of the true owner; for if such adverse possessor claim that identical title as his own, and found his possession thereupon, and it turns out that he has not obtained it, his possession will not be deemed adverse to the lawful owner of that title.

In the case of Dufour *v.* Camfranc, 11 Martin's Rep. 715, the defendant prescribed under a sheriff's deed; the court said, "The title presented here is perfect as it respects form; it pursues the very words of the statute; the defect is a want of right or authority in the sheriff to make such a conveyance, not a defect in the manner he made it. As nothing therefore appears upon the face of the deed which is defective, the knowledge of right in the person who sold, is not brought home to the vendee, and his error was one of fact, not of law. It is difficult to see where is the difference between this case and an ordinary one of sale, where the purchaser acquires, from a person who has no title, by a regularly executed act, before a notary public; in such case the buyer acquires none, but he has that good faith which enables him to plead prescription."

In the case of Jackson ex dem. Corson & Sebring *v.* Cairns & Coles, 20 Johns. Rep. 301, it appeared that Jacob Corson died seised and possessed of the premises in question, and other real estate, in 1772, leaving three children: Mary, the wife of John Simonson; Cornelia, wife of Ernest Linder, and, after his death, wife of James Duffie; and after his death, wife of Gozen Reyers; and Elizabeth, wife of Jacob Sebring. Mary, wife of Simonson, died in 1779, leaving two children, Cornelia, one of the lessors of the plaintiff, and John Simonson, who was living at the time of the trial. Cornelia, at the age of nineteen years, married Corson, in 1791, from whom she was legally divorced on the 4th of December, 1810, by a decree of the court of chancery, dissolving the marriage. Cornelia, the daughter of Jacob Corson, and afterwards the wife of Gozen Ryers, but before her marriage with him, and whilst she was the wife of Duffie, occupied with her then husband the premises in question. On the 23d of January, 1788, being then the wife of Gozen Ryers, she and her husband executed a deed to Terence Reilly, for one half of all the lands, &c., of which Jacob Corson, jun., died seised; this deed was never acknowledged by Mrs. Ryers; and on the 30th day of the same month, in the same year, Terence Reilly reconveyed the premises to Gozen Ryers. On the 21st of September, 1792, Gozen Ryers executed to the new loan officers of the county of Richmond, a mortgage of the premises in question. On the 13th of July, 1795, Mrs. Ryers died without issue. On the 5th of June, 1800, Gozen Ryers executed a mortgage of the same premises to Richard Waln, to secure the payment of 2000 dollars. In January, 1802, Gozen Ryers died. Before the death of Mrs. Ryers, her sister Elizabeth, one of the lessors of the plaintiff, married Jacob Sebring, jun.; he died on the 4th of August, 1803. The mortgage from Gozen Ryers to Richard Waln was foreclosed and sold under a decree of the court of chancery; Cairns became the purchaser, for the sum of 6300 dollars, and on the fifth of August, 1805, received a deed of the premises from a master. On the 2d of April, 1808, Cairns paid off the mortgage from Gozen Ryers to the new loan officers of the county of Richmond.

It was proved that Gozen Ryers was in possession of one-half of the Corson property, including the premises in question, from the time of his marriage with Cornelia, until his death; and that John P. Ryers, (his son, by a former marriage,) held possession of it, until after the sale of it to the defendant, Cairns. Gozen Ryers claimed the property as his own, by purchase from Terence Reilly; that such claim was asserted before and after the death of his wife. Cairnes had been in possession since the sale to him. The other half of the Gordon property had been held by John Simonson and others claiming under him, for many years, and as far back as the witnesses could remember, Gozen Ryers built several houses on the part possessed by him, in one of which J. Johnson lived in 1796.

The defendants set up an adverse title and possession.

Spencer, Ch. J., who delivered the opinion of the court, said: "It was decided by this court in the case of Jackson *v.* Sears, 10 Johns.

Rep. 435, and Jackson *v.* Stevens, 16 Johns. Rep. 116, that a grant in fee by the husband and wife, of the wife's lands, the deed not being acknowledged by her according to statute, passed only the husband's interest, and that the estate, after his death, reverted to her and her heirs. At the common law, the alienation of her husband, who was seised in right of his wife, worked a discontinuance of her estate. This was remedied by the statute of 32 H. VIII., ch. 28, s. 6, and which has been re-enacted here, 1 Greenleaf's Ed. L. N. Y. 393, and continued in the successive revisions of the statutes. The act was passed the 3d of March, 1787. The 2d section declares, that no fine, feoffment or other act, made or done by the husband only, of lands, the inheritance or freehold of the wife, during coverture, shall work a discontinuance, or be prejudicial or hurtful to the wife, or her heirs; but that the wife and her heirs, shall and may enter into all such lands, and hold the same according to their right and titles therein, as if no such fine, feoffment or other act had been done.

"The deed to Reilly, in January, 1788, although the wife joined in it, was not within this statute, for it was an act entirely null and void as to her. The statute intended where the conveyance was to divest her right, that she should alien according to law, that is, by a deed acknowledged by her, before a magistrate thereto authorized. That deed then, operated only as a deed from Ryers, and did not divest the right of his wife, or her heirs.

"When, therefore, Reilly re-conveyed to Ryers, the latter acquired no new right, but was merely reinvested with his former estate, the right to the possession during the coverture. The mortgage to the new loan officers, in 1792, by Ryers, is open to the same remarks. It had no effect on the wife's rights.

"It becomes wholly unnecessary to consider the effect of Ryers' mortgage to Waln, in June, 1800, for this action was brought within seventeen years thereafter.

"Cornelia Ryers died in July, 1795, and it becomes a question, whether the continuance of G. Ryers in possession from that time until his death, in January, 1802, acquired the character of a hostile and adverse possession as against the heirs of his wife. It is asserted by the defendant's counsel, that his possession became hostile and adverse immediately after the death of his wife, and they rely on the facts of his having erected buildings on the premises as early as 1796, and his claiming the premises to be his property.

"We must consider Mrs. Ryers as entitled to that part of the Corson estate which she possessed before her marriage with Ryers, and which he possessed during the coverture, and afterwards in severalty. There is no evidence that the co-parceners ever made partition, but the undisturbed possession of one moiety of the Corson estate by Simonson, and of the other by Mrs. Ryers and her husband, authorizes a presumption of a release among the co-parceners.

"As to Elizabeth Sebring, she was married to Jacob Sebring, before Mrs. Ryers' death. Sebring died in 1803. Unless then, G. Ryers

merely continuing in possession after the death of his wife, in 1795, claiming the premises as his, and erecting buildings thereon, constitutes an adverse possession, there is nothing to bar Mrs. Sebring's right to recover. It is observable, that G. Ryers made no coveyance of the premises after the death of his wife, until the 5th of June, 1800, when he executed a mortgage to Waln. I put out of view the deed to Reilly, and his conveyance to G. Ryers, as void and nugatory acts; Ryers must be considered as holding and enjoying the premises in consequence of his marital rights, and he was a tenant at sufferance after the death of his wife. 'An estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all.' 2 Bl. Com. 149. 'And this estate may be destroyed whenever the true owner shall make an actual entry on the lands, and oust the tenant; for before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger, and the reason is, because the tenant being once in by lawful title, the law, which presumes no wrong in any man, will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.' 2 Bl. Com. 149, 150. We perceive, then, that Ryers' continuance in possession after the termination of the estate he held in right of his wife, was a tenancy at sufferance, not tortious as regarded the true owner, and, consequently, not hostile or adverse to their right. His claim of title and building on the premises, can have no effect, for it does not appear that this was ever brought home to the knowledge of the lessors. I do not mean to admit, that had the claim been known to them, that a mere claim of title by a tenant at sufferance would create a disseisin, or a possession adverse to the true owner. It is unnecesary to decide upon the operation of the mortgage by Ryers to Waln, in 1800, or whether that constituted an adverse possession, although I am of opinion it did not; and that there never was an adverse possession until Cairn's entry, subsequent to the sale in 1805."

"I have been more particular in stating the reasons of the decision of the court in this case than was necessary, as all the principles were decided by this court upon a state of facts between the same lessors and Cairns, on a former occasion, but that decision was not reported. We then decided, that Ryers' continuance in possession was not adverse, and that the lessors were not barred by the statute of limitations."

Where A. bought land in 1782, and put B., one of his sons, in immediate possession, and declared he had bought it for him, and afterwards died, in 1789, leaving several children, his heirs at law, and B. continued in possession of the land above twenty-seven years, but without having obtained a deed from his father; it was held, that B. was in possession under his father, and not in his own right, or adversely to his father; and that the rest of the children of A. were entitled to their proportion of the land so occupied by B. Jackson ex dem. Bromley et al. *v.* Benjamin, 8 Johns. Rep. 101.

The will of a husband does not pass his wife's land, and no possession of the same by a devisee under the will, can create a presumption of title, or become adverse to the true owner. Bowie *v.* O'Neale et al. Lessee, 5 Harr. & Johns. Rep. 226.

2d. An adverse possession must be hostile in its inception; must be marked by definite boundaries; must be an actual occupancy, positive, notorious, uninterrupted, and continued for the space of time required by the statutes of limitations, in order to toll an entry.

That an adverse possession may be a bar, strict proof is required that it was hostile in its inception, and had continued so for twenty years; and the possession must also be marked by definite boundaries. Brandt ex dem. Walton *v.* Ogden, 1 Johns. Rep. 156; Guy *v.* Moffitt, 2 Bibb's Rep. 507; M'Gee *v.* Morgan, 1 Marsh. Rep. (Ky.) 62.

A person out of possession for more than twenty years, where there is not an adversary possession in virtue of some right, or by actual inclosures, his heir, or a person claiming under him, may bring an ejectment without actual entry into the land. Hammond et al., Lessee *v.* Warfield, 2 Harr. & Johns. Rep. 156.

The rule, that an adverse possession, to bar an ejectment, must be hostile in its inception and continue so for twenty years, does not apply to the entry of the tenant; but to the act by which the possession becomes adverse. Jackson ex dem. Krom *v.* Brink, 3 Cow. Rep. 483.

An entry adverse to the lâwful possessor is not to be presumed. It must appear by proof. Jackson ex dem. Gansevoort et al. *v.* Parker, 3 Johns. Cas. 124.

If it be stated in a bill of exceptions upon a trial in ejectment, that the testator of the defendant departed this life in possession of the land, which possession he had held "adverse to the lessor of the plaintiff," for a specified time; it must not be understood that such possession was adverse to those under whom the lessor of the plaintiff claimed; especially if it appear from another bill of exceptions, in the same trial, that the title of the lessor of the plaintiff did not commence until after the death of the said testator. Bream *v.* Cooper's Heirs, 5 Munf. Rep. 7.

If it appear from the record in ejectment, that the defendant or his testator had adverse possession of the land, at the time when a deed of trust, under which the plaintiff claims was executed, judgment ought to be rendered for the defendant, although the nature of his title do not appear. Ib.

The plaintiff claimed the premises in question as heir at law of his father, and clearly made out a good title in his father; the court said:

"It was incumbent on the defendant to show that that title had been defeated by an adverse possession agreeable to the statute of limitations, during the father's lifetime. This title by possession so as to defeat a grant, or other legal conveyance, is never to be presumed; but must be actually proved and shown, in order to rebut a prior title, in the same manner and with the same degree of precision, as the plaintiff must show a clear title in him, before he can recover." Rochell ads. Holmes, 2 Bay's Rep. 491.

It is a settled rule that the doctrine of adverse possession is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner. And if a person enter without pretence of title, his possession will be deemed the possession of the true owner. Jackson ex dem. Bonnell et al. *v.* Sharp, 3 Johns. Rep. 169.

"And wherever an adverse possession is relied on, it seems that there should be some proof of an actual ouster, for presumption of adverse possession from circumstances shall scarcely be deemed sufficient." 2 Esp. Ni. Pri. 9, (old paging, 435.)

A claim and color of title sufficient to destroy all presumption that the defendant is in possession under the plaintiff, is adverse. Jackson ex dem. Dunbar et al. *v.* Todd, 2 Caines' Rep. 183; *Et vide* Jackson ex dem. Putnam et al. *v.* Bowen, 2 Caines' Rep. 358.

Where both plaintiff and defendant derived title from the same person, who had been seized of the premises, it is not necessary that the plaintiff should show a title out of the commonwealth. Patton et al. *v.* Goldsborough, 9 Serg. & R. Rep. 47.

An ejectment cannot be defeated by the tenant's showing an adverse grant of the same date, without showing also that his possession was acquired under such adverse grant. Bowman *v.* Bartlett, 4 Bibb's Rep. 554.

Whether a possession claiming title, under a parol gift of land from the owner, is such an adverse possession as will bar an ejectment? *Quære.* Jackson ex dem. Bradt et al. *v.* Whitbeck, 6 Cow. Rep. 632. Jackson ex dem. Young et al. *v.* Ellis & White, 13 Johns. Rep. 120. *Sed vide* Jackson ex dem. Van Allen *v.* Rogers, 1 Johns. Cas. 33, where it is decided, that such a possession is not adverse to the grantor, and that the grantee was merely a tenant at will.

"In order to gain a title by possession under this act [*statute of limitations of North Carolina*,] these circumstances must concur—he must be possessed of land which hath been actually granted; a possession of

vacant lands will not do, unless attended with such circumstances as required by the late act of assembly for limiting the claim of the state —he must take possession with a belief that the land possessed is his own, as under a patent, or deed under some patentee—he must take possession with such circumstances as are capable in their nature, of notifying to mankind that he is upon the land, claiming it as his own, as in person or by his tenant—this notorious possession must be a continued possession—a secret taking possession, and not continuing it, as it cannot answer the purpose of notoriety, to adverse claimants, cannot extinguish their claim for having not been put in in due time." "A single act of taking possession and then leaving the land, will not do. The possession that is capable of ripening into title, must be notorious, and continued for seven years without entry, claim or action, on the other side." Den ex dem. Andrews *v.* Mulford, 1 Hayw. Rep. 320, 321. *Et vide* Den ex dem. Park *v.* Cochran et al., Ibid. 180. Den ex dem. Slade *v.* Smith, Ibid. 249. Borrets *v.* Turner, 2 Ibid. 114.

Possession of lands for seven years under color of title bars the right of entry although the possessor knew at the time he obtained his color of title and took possession, that the lands belonged to another person. Den ex dem. Reddick et ux *v.* Leggat, 3 Murph. Rep. 539.

But in the case of Miller et al. *v.* Shaw, 7 Serg. & R. Rep. 138, GIBSON, J., said: "The truth is, that the statute [*of limitations*] was never intended as the means of acquiring title or as an encouragement to people to enter on each other's land with a view to hold it; but to compel them to decide their controversies while transactions are recent and the evidence of them is attainable; and there its operations in protecting a possession under a bad title, or no title at all, is but a *consequence* of the object of its enactment, but not the object itself."

And in the case of Den ex dem. Jones *v.* Ridley, 2 N. Car. Law Rep. 400, TAYLOR, Ch. J., delivering the opinion of the court, said: "But a possession for this period can only meet the spirit and design of the law, [*the statute of limitations,*] when it is unknown and uninterrupted; for as it is founded on the supposition that the possessor really believes he has title, this idea is weakened rather than confirmed, by his occasionally withdrawing from the possession, and leaving the land without cultivation, without occupancy, and without a tenant." *Et vide* M'Iver et al. *v.* Ragan et al., 2 Wheat. Rep. 29. Jackson ex dem. Ten Eyck et al. *v.* Frost, 5 Cow. Rep. 351; both cited *ante* page 456.

"In New Jersey the action of ejectment has always been considered on the same footing with a writ of right, it has been too solemnly settled to be now disputed, that the statute of James, stat. 21 Jac. 1, c. 16, 3 Ruffhead, 100, does not extend here; and therefore all the legal consequences arising from that statute, one of which is that twenty

years adverse possession, like a descent cast, tolls an entry, falls to the ground." Den ex dem. Bickham *v.* Pissant & Lardner, 1 Coxe's Rep. 222.

It must be marked by definite boundaries.

In the case of Jackson ex dem. Hardenburg et al. *v.* Schoonmaker, 2 Johns. Rep. 234, KENT, Ch. J. who delivered the opinion of the court, said:

"The *possession fence*, as it was termed, which was run round the large tract in 1774, I do not consider as an adverse possession, sufficient to toll the right of entry of the true owner, after twenty years. This mode of taking possession is too loose and equivocal. There must be a real and substantial enclosure, an actual occupancy, a *possessio pedis*, which is definite, positive and notorious, to constitute an adverse possession, when that is the only defence, and is to countervail a legal title." (The *possession fence*, in this case, was made by felling trees, and lapping them one upon another round the land.)

An adverse possession for more than twenty years without any demarcation or defined boundary, but on land which is afterwards included in a survey and patent, neither of which were of twenty years standing at the commencement of the suit, furnishes no available defence in an ejectment. Shearer & Brooks *v.* Clay, 1 Litt. Rep. 260.

A naked possession, (possession without right,) is adversary only to the extent of actual enclosures. Hammond et al. Lessee, *v.* Warfield, 2 Harr. & Johns. 151.

A possession of more than twenty years, when taken before the survey or patent, is limited by the actual close. Brooks et al. *v.* Clay, 3 Marsh. Rep. (Ky.) 545.

When an usurper enters on land, he acquires possession, inch by inch, of the part which he occupies. The possession of one who shows no title, when the extent of it is not shown to have reached within a mile of the *locus in quo*, cannot be considered a possession of it. Prevost's Heirs *v.* Johnson et al., 9 Martin's Rep. 123.

In the case of Jackson ex dem. Teed et al. *v.* Halstead, (5 Cow. Rep. 219, 220,) the opinion of the court was delivered by WOODWORTH, J.; he said: "The plaintiff is entitled to recover the small parcel of land lying between the two acres and seventeen rods and the river; unless the deed from Palmer to Jennings is in operative, in this respect by reason of an adverse possession at the time is was executed. The boundaries in the defendant's conveyance do not include this parcel. He cannot, therefore, rest on the ground of a good constructive possession; but must make out a *pedis possessio*, or actual occupancy, with claim of

title. The adverse possession must be marked by a substantial enclosure, and continued down, to render it available. 2 Johns. Rep. 234; 10 Ib., 477; 1 Ib., 156; 1 Cow. 285." "From the whole of the evidence, I understand that the small parcel was inclosed by a fence on all sides, excepting on the northerly line, where it extended a part of the way only; and, at that portion of the line where it did not continue, the high bank served as a substitute. For the purpose of notoriety, as well as good husbandry, this was a substantial enclosure. Why require a fence, where nature had formed a sufficient barrier, to prevent the intrusion of cattle? The defendant sufficiently marked the extent of his possession. Suppose a lot of land is bounded on the one side by a navigable riger, or a continued ledge of rocks, or a mountain of difficult ascent or decent, and that the other sides are well inclosed; would not this, with a claim of title, constitute an adverse possession? it certainly would; because, in such a case, everything had been done that could reasonably be required to protect the crop, or denote exclusive occupancy. The case before us is analogous. The defendant's possession was adverse when Palmer assigned to Jennings; and so continued to the time of commencing the action."

In the case of Cheney *v.* Ringgold et al., (2 Harr. & Johns. Rep. 87, 94,) BUCHANAN, J., delivering the opinion of the court, said: "This is a case of two conflicting claims, in which the pretentions of both parties are set out. The lessors of the plaintiff, with title, having possession by inclosure and cultivation of a part of a tract of land in dispute, claiming the whole; and the defendant, without title, having possession by inclosure of a part of the same tract of land, with the use (by cutting timber, &c.,) of other parts not enclosed. As to that part of the land which was in the possession of the defendant and his ancestor, Charles Cheney, by actual enclosure for more than twenty years next preceding the bringing of this suit, the plaintiff is bound by the act of limitations; but not as to the parts used by the defendant exterior to the enclosure."

Where the defendant, in an action of ejectment, was in possession of one hundred acres of land, by enclosures and cultivation, for fifteen years, and then enlarged his enclosures so as to include one hundred and fifty acres, and he possessed the same, so enlarged by enclosures, for six years thereafter, claiming the same as his own: Held, that he had title to the one hundred acres by adversary possession. Hall *v.* Gitting's Lessee, 2 Harr. & Johns. Rep. 380.

It must be an actual occupancy, positive, notorious, uninterrupted, and continued for the space of time required by the statute of limitations.

Upon an unoccupied island, in the river Delaware, one Gould built a small house which was called his "Study," in which he kept a table

and some books, and occasionally repaired there for the purpose of studying. There was no evidence that he ever slept there, but his family resided on his property on the adjacent shore. Gould made no further improvements on the land, and, some time previous to his death, he removed his study away from the island. During the whole period in which he held this possession, the neighbors were in the habit of driving their cattle on the island, and no exclusive appropriation was claimed by any one. It appeared that a possession of a similar kind continued in Gould's widow and children, after his death, in 1743, until some time in the year 1755, when it was alleged, one Logan ousted Gould's family from the possession, and he, and those claiming under him, had ever since retained it. The lessors of the plaintiff claimed under Gould, by virtue of a deed dated in March, 1786, from the heir at law of Gould, to Samuel Tucker; this conveyance recited a preceding one, made in the year 1776, which, it was alleged, had been captured by the British, and lost or destroyed. Upon this evidence, the plaintiff rested.

The defendant relied upon a possessory right, under Logan, who, it was proved, had possession of the property, in 1756, built a house upon it, fenced, and improved it. A paper was produced, purporting to be articles of agreement between William Logan and Henry Bristol, dated September 6, 1766; by which Logan conveyed all his right, improvement, and possession, but the instrument was without seal. Bristol conveyed to Ridley. Ridley, January 18, 1775, conveyed his title to this property and some other things, to William Yardley, for a valuable consideration. Yardley conveyed to John White, the defendant, in 1776, for a valuable consideration. The paper title of the defendant had always been accompanied with the possession. Held, that "the facts proved were sufficient evidence of an adverse possession, at least, from 1776, (35 years before the trial,) in the defendant and those under whom he claimed title, to bar the plaintiff's suit." Doe ex dem. Tucker et ux. et al. *v.* White, 1 Coxe's 94.

In the case of Shannon *v.* Kinney et al., (1 Marshall's Rep. (Ky.) 4,) there was a continual adverse possession for more than twenty years, but it appeared that Hugh Shannon, who first took the possession of the land in controversy, before he had been in possession twenty years, surrendered the possession to the defendants or those under whom they held, in pursuance of a decree entered upon an award giving them the land in virtue of an adverse claim, and that they had not had the land in possession twenty years prior to the commencement of this suit. The court held, that this circumstance would not prevent the statute of limitations from operating as a bar to the plaintiff's recovery; that an adverse possession for twenty years would toll his right; and that it could not, "in the reason and nature of the thing, produce any difference, whether the possession be held uniformly under one title, or at different times under different titles, provided his claim of title be always adverse

to that of the plaintiff, or whether the possession be held by the same or a succession of individuals, provided the possession be a continued and uninterrupted one. *Et vide* Hord *v.* Walton, 2 Ib., 620.

In the case of Lessee of Potts *v.* Gilbert, decided in the circuit court of the United States for the third circuit, and reported in the first volume of Hall's Journal of Jurisprudence, 252, 256, WASHINGTON, J., in charging the jury, said:

"The adverse possession before mentioned must not only continue, but it must continue the same in point of locality during the prescribed period of time sufficient to count it a bar; that is to say, a roving possession from one part of a tract of land to another, cannot bar the right of entry of the owner upon any part of the land which had not been held adversely for twenty-one years, although the different periods of possession of the separate parcels should amount in the whole to that number of twenty-one years. For it is a clear principle of law, that the right acquired by adverse possession of a disseisor, or other, who enters or retains possession by wrong, can never extend beyond the limits of the particular spot to which his possession was confined. If he could go beyond those limits, there would exist no other to circumscribe his claims. He cannot resort to the metes and bounds of the tract upon which he has settled, because the legal possession of the owner continues unaffected by this tortious entry; except so far as the actual adverse possession has disturbed this, the legal owner is constructively in possession of the whole tract, because his title extends to the whole. A wrong-doer can claim nothing in relation to his possession by construction."

"The court is perfectly clear that, where different persons enter upon land in succession, each retaining the possession for a period short of twenty-one years, the last possessor, who may be the defendant, cannot tack the possession of his predecessors to his own, so as to make out one entire continuing possession of twenty-one years, to bar the entry of the owner. The possession of A., the first occupant, cannot be the possession of B., the next occupant, because the moment A. quits the actual possession, the legal possession of the real owner is restored, and the entry of B. constitutes him a new disseisor, and if he seeks to bar the entry of the owner, he must show an actual adverse possession continued in himself for twenty-one years.

"There is in truth no privity between A. and B.

"Neither do we think that the present case is strengthened in favor of the defendant by the evidence of the witness, who states that the several occupants sold to their successors. Nothing can be more vague than this testimony. It does not state that any conveyances were executed, or what each person sold; whether it was title, possession, or good will; or whether any two of the sales were applicable to the same spot. Indeed, what had any of them to sell?

"Not only is adverse possession to bar an entry to be confined to the particular parcel so occupied, but some evidence should be given to

show the location of such parcel, that it may be seen whether the continuity of possession during the whole period, was applicable to it."

The undisturbed possession of part of a tract of land, without title, is no evidence that the persons holding such possession claimed the whole tract. Corporation, &c. *v.* Hammond, 1 Harr. & Johns. Rep. 580, 603.

In the case of Doe ex dem. Clinton et al. *v.* Campbell et al., 10 Johns. Rep. 477, the court, after discussing the plaintiff's title, said: "The remaining point in the case is, whether any title superior to this was shown on the part of the defendants, or any bar to the action by means of adverse possession. In the suit against Campbell, there was no possession of twenty years pretended; and the possession which one Smith commenced about twenty-five or twenty-six years before the trial, under color (as it was to be presumed) of a deed from one Hake, was on the farm occupied by Elliot. No other possession of twenty years' standing was shown, and, consequently, the defence of twenty years' adverse possession could only apply to the suit against Elliot. And in the suit against him, the adverse possession is unavailing. The possession commenced by Smith consisted only of a small clearing of five or six acres, and it is not ascertained in what part of Elliot's farm it was to be located. But the decisive objection to this defence is, that no regular deduction of title or privity and continuity of possession was shown, and deduced down from Smith to Elliot, or to any of the other defendants. Adverse possession must be marked by definite boundaries, and be regularly continued down to render it unavailing." Brandt *v.* Ogdens, 1 Johns. Rep. 156.

An adverse possession is "a possession under color of title, taken by a man himself, his servants, slaves, or tenants, and by him or them continued without interruption for seven years together." Grant *v.* Winborne, 2 Hayw. Rep. 57.

Actual ouster, and adverse possession, of any lands, tenements or hereditaments, for fifteen years after the title, or cause of action accrued, and before suits brought, bars the plaintiff of his right of entry thereafter, whether the ouster and adverse possession be by the same person or persons, for the whole term of fifteen years, or by different persons for different periods, making fifteen years in the whole; provided the disseisin and adverse possession have been continued and uninterrupted; and provided that the plaintiff does not come within any of the exceptions mentioned in the provisions of the statute, extending the term of time, in which entry may be made. Fanning *v.* Wilcox & Palmer, 3 Day's Rep. 269.

To make out an adverse possession, the defendant must prove actual possession by enclosure of the tract which he claims, for upwards of twenty years. Gibson *v.* Martin, 1 Harr. & Johns. Rep. 545.

Twenty years' possession, under a vague unsurveyed entry, affords protection, as an adverse possession, only to the extent of the actual close. Henderson *v.* Howard's Devisees, 1 Marsh. Rep. (Ky.) 26.

The settlement required by the statute, limiting the time of bringing suits against actual settlers, is a settlement and residence on the land; clearing and cultivating the land is not sufficient. Hog. *v.* Perry, 1 Littell's Rep. 171; Smith *v.* Nowels, 2, Ib., 160; Hite's Heirs *v.* Shrader, 3 Ib. 456; *Et vide*, Skyle's Heirs *v.* King's Heirs, 2 Marsh. Rep. (Ky.) 585; Anderson *v.* Turner, 3 Marsh. Rep. (Ky.) 133; Bodley *v.* Coghill's Heirs & Hord, Ib. 615; Moore *v.* Farrow et al., Ib. 49.

To prevent the recovery in ejectment by a plaintiff having title, it is "necessary to show on the part of the defendant, an actual and continued occupancy of the land in dispute, for twenty years; and most certainly the occasional cutting of timber upon the land, does not amount to such a continued occupancy." Braxdale *v.* Speed, 1 Marsh. Rep. (Ky.) 106; Smith *v.* Mitchel, Ibid, 207; *Et vide*, Trotter *v.* Cassady et al., 3 Marsh. Rep. (Ky.) 366.

An entry upon land without color of title, and occasional acts of cutting timber continued for fifteen years, but without any permanent improvements or enclosures, will not enable the claimant to defend in ejectment at the suit of the owner. Doolittle *v.* Lindsey, 2 Aiken's Rep. 155.

In the case of Cheney *v.* Ringgold et al., Lessee, 2 Harr. & Johns. Rep. 87, 95, BUCHANAN, J., delivering the opinion of the court, said; "Even if the defendant's possession by enclosure commenced first, which is not stated to be the case, that, and his cutting timber exterior to the fences, could not have prevented the constructive possession vesting by operation of law, in Jordan, of all the unenclosed parts of the Number of Two, on the actual entry and enclosure made by him, and those claiming under him, upon a part of that tract of land, within twenty years from the date of the grant, claiming title to the whole. But if the possession, by enclosure, of the lessors of the plaintiff, and those under whom they claim, commenced first, and for anything appearing in the record that may have been the fact, surely no cutting, &c., by the Cheneys exterior to their enclosures, could so divest the possession, cast by law upon the plaintiff, of the unenclosed parts of the Number of Two, as to let in the operation of the act of limitations."

The possession that will give a title under the statute of limitations, must be an actual occupancy, a *pedis possessio*, definite, positive and notorious. Baily et al. *v.* Irby et al., 2 Nott & M'Cord's Rep. 343.

Digging a canal and felling trees are not such acts of possession, as may be the basis of the prescription of thirty years. Macarty *v.* Foucher, 12 Martin's Rep. 11; *et vide* Prevost's Heirs *v.* Johnston et al., 9 Martin's Rep. 123.

The occasional exercise of dominion, by broken and unconnected acts of ownership, over property which may be made permanently productive, is in no respect, calculated to assert to the world a claim of right; for such conduct bespeaks, rather the fitful invasions of a conscious trespasser, than the confident claims of a rightful owner. Den ex dem. Jones *v.* Ridley, 2 N. Car. Law. Rep. 400. (Per TAYLOR, Ch. J., delivering the opinion of the court.)

But in the case of Robinson *v.* Sweet et al., 3 Greenl. Rep. 315, 319, it was said that the lands in dispute, "being wild and uncultivated, the jury were not to expect the same evidence of occupancy which a cultivated farm would present to them; but that facts and conduct on the part of a person exercising acts of ownership and claiming, adversely, title and possession, would amount in law to possession of the land, and disseisin, if known and acquiesced in by him who has the right; when if unknown and not acquiesced in by such party, they would not amount to such possession and disseisin, but only to successive trespasses."

Where the owners of contiguous lands "have established a fence varying from the line described in the deeds, and each party has held and occupied up to his side of the fence, claiming to hold accordingly, for twenty years; neither can maintain a possessory action against the other." But where the parties have agreed upon a fence variant from the line, avowedly for convenience, and still have continued to claim according to the true line, neither party acquires a title, or even a right of possession against the other, merely on account of the fence." Burrell *v.* Burrell, 11 Mass. Rep. 298.

If the defendant in ejectment set up the act of limitations, he must stand on his own possession, and cannot call in the possession of one whose title the plaintiff has purchased, to assist him. Cluggage et al., *v.* Dawson's Lessee, 1 Serg. & R. Rep. 111.

"Residence is not necessary, to make an adverse possession. Land may be inclosed and cultivated without residing on it. And the possession is as much adverse in one case as in the other." Johnston *v.* Irwin, 3 Serg. & R. Rep. 202.

A title by warrant and survey, without patent, is within the act of limitations of 26th March, 1785, (Pennsylvania,) and is barred by an adverse possession of twenty-one years. M'Koy *v.* The Trustees of Dickinson College, (in error,) 4 Serg. & R. Rep. 302.

In the case of Pedrick *v.* Searle, 5 Serg. & R. Rep. 240, TILGHMAN, Ch. J., delivering the opinion of the court, said: "Let us consider, then, the force of the other reason urged by the plaintiff; that the possession having been delivered to the plaintiff by virtue of a recovery in a court of justice, the act of limitations was thereby avoided, because the continuity of the defendant's possession was broken. If the continuity of

possession had been broken before the expiration of twenty-one years, the period required to give effect to our act of limitations, the argument would have been good. An entry within the twenty-one years, destroys the efficacy of all prior possession, so that to gain a title under the act of limitations, a new adverse possession for twenty-one years must be had."

A possession to prevent a recovery, or vest a right under the statute of limitations, must be actual, continued, adverse and exclusive. An easement claimed out of the land of another, can never be the subject of such limitation, for it is not constant, exclusive, and adverse; but a continued exclusive possession and enjoyment, with the knowledge and acquiescence of the owner of the inheritance, for twenty-one years, would be evidence from which a jury might presume a right, by grant or otherwise, to such easement. Cooper et al. *v.* Smith, 9 Serg. & R. Rep. 26.

The possession need not be by the same person and under the same right; and when held by different persons a privity must have existed between them. Winn *v.* Wilhite, 5 Marsh. Rep. 524. (New Series.)

Persons having a right of entry into land at the time of passing the act of limitations of the 26th March, 1785, are not barred by an adverse possession of fifteen years from that time; there must be twenty-one years' adverse possession to bar them of their right, whether their right existed before or arose after that act. Packer's Lessee *v.* Gonsalus, (in error,) 8 Serg. & R. Rep. 147.

In Pennsylvania, if defendant in ejectment rely upon the statute of limitations, he must show an adverse continued possession for twenty-one years: possession for fifteen years, under the act of 1785, is available only where the adverse possession existed at the time of the passing of the law. Lessee of Griffith *v.* Bradshaw, Circ. U. S. P. Oct. 1821, MS. Cited in Coxe's Dig. 273.

"Possession of land so as to prevent a bar, must be an actual possession of some part in dispute. Cultivation of part of the defendant's claim, not within the bounds of the disputed part, is not sufficient to authorize the bar of the statute." Napier's Lessee *v.* Simpson, 1 Tenn. Rep. 453.

It has been held, that a *constructive* adverse possession of a small tract of land may be admitted where the defendant has a paper title for such small tract, although he has been in the actual occupancy of only a *part* of such tract.

In ejectment, the defence of twenty years' adverse possession, in order to countervail a legal title, must be supported by twenty years' actual

occupancy, or substantial inclosure of the premises by the defendant, or by him and those through whom he derives title. A cultivation of *part* of the premises for that time, with a claim of title to the whole, will not constitute a defence beyond the portion actually improved. And even where such possession is under a deed or paper title, for a large tract of land, (e. g. 783 *acres*,) and only a small part is improved, (e. g. *two acres*,) with a claim of title to the whole, this will not constitute an adverse possession, beyond the actual improvement. And where one takes a deed, purporting to describe a tract of land; but which, by a mistake in the description, covers nothing; and the grantee, by occupation, takes possession of a part, and claims title to the whole of the supposed tract, under the deed, this is an adverse possession only as to the part actually improved. And, accordingly, in Jackson ex dem. Dervient *v.* Lloyd, decided October Term, 1820, but not reported, where the defendant had a deed for lot four, but possession of lot six, adjoining, believing it to be lot four, and claiming it as such, and improving a part: it was held, that his adverse possession did not extend beyond his actual improvements. The doctrine of the constructive adverse possession of lands, by the cultivation of part, accompanied by a claim of the whole, under a deed, does not apply to large tracts of land, not purchased for the purpose of actual cultivation. The doctrine is in general applicable to a single farm or lot of land, only, purchased for the purpose of actual cultivation. A constructive adverse possession, must be founded on a deed or paper title, though such title need not be a rightful one. Jackson ex dem. Gilliland et al. *v.* Woodruff et al., 1 Cow. Rep. 276. *Et vide* Miller, &c., *v.* Dow, 1 Root's Rep. 412.

If a defendant in an action of ejectment, prove that he or those under whom he derived title, purchased the whole of the lot demanded—took a paper title therefor—went into possession under that title, and cleared one acre, more than fifteen years before the commencement of the plaintiff's action, and that the possession has accompanied such title, notwithstanding such title should prove invalid, he will hold the whole lot under the statute of limitations. A possession of a part under such purchase, being a possession of the whole, is a bar to the action. Doe ex dem. Pearsall *v.* Throp, 1 Chipman's Rep. 92.

If a patentee enters upon part of the land in controversy, with an *intention* of possessing the whole, it shall be considered as a possession of the whole; but if he enters upon a definite part, with a view to possess such part *only*, his possession is confined to such part. Bowman *v.* Bartlett et al., 3 Marsh. Rep. (Ky.,) 99. Bodley *v.* Cogshill's Heirs & Hord, Ib. 615.

A lease of a small tract of land (e. g. *sixty-three acres*,) and an actual possession by the lessee, of a part, with a claim of title to the whole, constitutes an adverse possession of the whole.

And while it is so possessed, a conveyance, by any one except the

adverse possessor, to another, of a part of the land so possessed, though it also include an adjoining parcel not so possessed, and the grantee enter upon the latter parcel, claiming to the whole extent of his conveyance, will not constitute the grantee, a constructive or actual possessor, beyond the parcel on which he enters.

If one have constructive possession by color of title, and occupying a part; another cannot acquire a constructive possession to the same extent in the same manner; but though the latter enter on part, with color of title to the whole, and claim the whole, his possession will be confined in extent, to the part which he actually occupies. Jackson ex dem. Housbouck *v.* Vermilyea, 6 Cow. Rep. 677. *Et vide* Calk *v.* Lynn's Heirs, 1 Marsh. Rep. (Ky.) 346.

A settler taking possession under one claim, without intending to intrude on another, but accidentally intruding, acquires no interfering possession out of his actual close. Smith et al *a.* Morraw, 5 Littell's Rep. 210. M'Kinny *v.* Benny et al., 1 Marsh. Rep. (Ky.) 460.

And this accidental and unintentional intruder selling his claim to another, (who holds an elder patent on the claim intruded on,) transfers no right of possession to his vendee, within the claim intruded on, except to the extent of the close. M'Kenny *v.* M'Kinny et al., Ib.

The right of entry in an elder outstanding patentee, is not tolled by an adverse possession of more than twenty years of a part of the land covered by such elder patent, except so far as the adverse possession extended. Voorhies *v.* Bridgeford, 3 Marsh, Rep. (Ky.,) 27.

If an entry be made on a demarked survey, but, before patent issues thereon, the possessor is in possession to the extent of the lands, the limitation runs from the entry, and is not confined to the date of the patent. Roberts et al. *v.* Saunders, 3 Marsh, Rep. (Ky.,) 29.

The holder of a descriptive warrant without survey, who has ascertained the limits of his claim by marked boundaries, taken up his residence on the land, cleared a large quantity and cultivated and improved it, is in possession of the whole tract; and if a third person enters on a part of it, nothing short of twenty-one years' adverse possession, will bar the entry of the warrant holder. Such a case is not within the meaning of the 5th section of the act of limitations of 26th March, 1785, [of Pennsylvania.] Gonzalus et al. *v.* Hoover et al., Serg. & R. Rep. 118.

But in the case of Miller et al. *v.* Shaw, 7 Serg. & R. Rep. 143, Duncan, J., said: "A wrongful possession cannot be extended by construction; constructive possession always accompanies the right. It is a contradiction in terms, that a man by wrong, should have any right, and that this right, by wrong, should be extended by construc-

tion. There cannot be two conflicting constructive possessions, one in the owner and the other in the trespasser. The right always draws to it the possession, and it there remains, until seised by the wrong-doer, whose possession is strictly *possessio pedis;* who must necessarily be confined to what he has grasped, his real and actual possession. Beyond that, no length of time will protect him; because beyond that the owner's possession has never been changed; it always is in contemplation of law, continued in him. These are the dictates of common sense, of common justice, and of the common law. Did they need authority to support them, authorities abound in the decisions of the courts of the several states, and of the supreme court of the United States." *Et vide* Royer et al. *v.* Benlow, 10 Serg. & R. Rep. 305.

Where a man enters on a tract of appropriated land, without title, or color of title, the act of limitations will not protect him beyond his actual enclosures. Farley et al. *v.* Lenox, 8 Serg. & R. Rep. 392. Davidson's Lessee *v.* Beaty, 3 Har. & M'Hen. Rep. 621.

An improver who enters upon land held by another by warrant and survey, is protected after twenty-one years, by the statute of limitations as to all he encloses or cultivates without enclosure, but not as to those parts which remain in wood, and unenclosed; though he uses them for fuel, fences, &c. This is the general rule, but it seems there may be exceptions; such as the owner's confessing himself out of possession of the woodland unenclosed; suffering the improver to pay the taxes for it; or perhaps the case of a piece of unenclosed woodland lying between two neighboring cultivated parcels, might be left to the jury. There may perhaps be other cases of exceptions. Royer et al. *v.* Benlow, 10 Serg. & R. Rep. 303.

But where a large tract of land is divided into lots, the possession of one lot adversely will not create a constructive adverse possession of the other parts of the tract, although claimed by the defendant under the same paper title.

In Jackson ex dem. Ten Eyck & Wife *v.* Richards, 6 Cow. Rep. 623, the opinion of the court was delivered by SUTHERLAND, J., he said: "The judge decided correctly upon the subject of adverse possession; that the tract H. being a large tract of land subdivided into different lots, the occupancy of any one of the lots would not give a constructive possession, or create an adverse possession of other parts of the tract, (Jackson *v.* Woodruff, 1 Cow. 276,) and as lot No. 12, the premises in question, was not actually possessed at the time of the marriage of the lessors of the plaintiff, there was no adverse possession to bar the right of the lessor Ann Ten Eyck. The question has been repeatedly decided by this court. Indeed, the point was abandoned by the defendant's counsel upon the argument."

An alienee entering on his lands (which were bounded) gains a possession only to the extent of his limits, and that possession does not enure to the benefit of his alienor, or give him the possession of lands outside of the alienee's bounds. Murray et al. *v.* Waugh, 1 Marsh. Rep. (Ky.) 452.

A patentee extending shelter to an occupant whose possession is meted and bounded, acquires possession only to the extent of the occupant's claim. Lee *v.* McDaniel, 1 Marsh. Rep. (Ky.) 234.

But, a landlord settling a tenant on his patent, with an intent to gain possession, (giving his tenant no bounds,) is *ipso facto* in possession to the limits of his patent. Ib. 234.

Lands not susceptible of alienation cannot be acquired by prescription. Mayor, &c., *v.* Magnon, 4 Martin's Rep. 2.

Adverse possession to be effectual must be continued for the space of time required by statute.

In the case of Hall *v.* Gittings' Lessee, 2 Har. & Johns. Rep. 112, 126. CHASE, Ch. J., said: "Holland's park having been legally granted to George Holland, nothing can defeat his title, and the title of his heirs, to the said land under his grant, but twenty years' adverse possession."

The act of limitations runs in equity in favor of an adverse possession, where it would at law. Harrison *v.* Harrison et al., 1 Call's Rep. 419. Bell *v.* Beeman et al., 3 Murph. Rep. 273.

A bill in chancery cannot be sustained to recover land from one who has been twenty years in possession prior to the commencement of the suit, and under a title from an adverse grant. Wilson's Heirs *v.* Bodley, 3 Littell's Rep. 55, 59.

The shortest period which a court of equity is bound to consider an absolute bar to a suit respecting real estate, in analogy to the limitation of actions at law, is twenty years. Hawley *v.* Cramer, 4 Cow. Rep. 718.

In the case of Ward *v.* Van Bokkelen, 1 Paige's Rep. 101, WALWORTH, Ch. J., said: "If the conveyance was fraudulent, no period of time, short of twenty years, will prevent the persons intended to be defrauded thereby from pursuing their remedy against the land in the hands of the fraudulent grantee, or her heirs or devisees. Twenty years is the shortest limitation of actions at law respecting real property in this state, and by analogy to the statute of limitations, that is the shortest period which can bar a proceeding in this court to set aside conveyances of real property, on the ground of fraud."

Twenty years at least are required to bar the equity of redemption in cases of mortgages of a legal or equitable interest in real estate. Slee *v.* The Manhattan Company, 1 Paige's Rep. 80.

Possession for more than twenty years under an adverse title, bars relief in equity, except where the complainants labored under some disability. Floyd's Heirs *v.* Johnson et al., 2 Littell's Rep. 109, 112.

The Maryland statute of limitations of three years is a good bar to an action of assumpsit for money had and received brought to try a title to lands in the city of Washington, under the 5th section of the act of Maryland of November, 1791. Beatty's admrs. *v.* Burne's admrs., 8 Cranch's Rep. 98.

In the case of conflicting grants, twenty years' possession will not avail the defendant in chancery, unless he shows that he has obtained the elder grant for twenty years previous to the institution of the suit. BOYLE, Ch. J., delivering the opinion of the court, said: "It is certainly a general rule that a court of equity will not relieve against a possession with right after the lapse of twenty years. Whether this rule is applicable to controversies like the present, growing out of original adverse claims, does not seem necessary to be decided in this case. For we are of opinion, that admitting it to be so, the case made out by the defendants does not entitle them to avail themselves of it; for they have not exhibited the grant under which they claim; nor does the date of it appear from any part of the pleadings. It is indeed alleged by the complainant that it is elder than that under which he derives title: but his bears date only about nine years before the commencement of this suit. So that the grant under which the defendants claim, though elder than that of the complainants, may have been issued much less than twenty years prior to the commencement of this suit; and it is plain that previous to the emanation of their grant, the complainant could not maintain his suit: for it is that circumstance alone which gives to a court of equity jurisdiction of the cause; and until the cause of action arose, and the jurisdiction of the court attached, laches cannot be ascribed to the complainant." Briscoe, &c., *v.* Prewet, 4 Bibb's Rep. 370.

Twenty years' possession of an easement or use of a water course is a conclusive presumption of right, if unexplained. Hazard *v.* Robinson, 3 Mason's Rep. 272. Hurlbut *v.* Leonard, Brayt. 201.

An absolute right to a water course, may be acquired, by fifteen years' uninterrupted possession, use, and occupation, claiming right thereto adverse to all others. Rogers *v.* Page et al., Brayt. Rep. 201. *Et vide*, Hurlbut *v.* Leonard, Ibid. 202.

A right to a privilege appurtenant to land may be gained by an exclusive enjoyment for a sufficient length of time, in analogy to the

statute of limitations; but no period short of that required by such statute to gain a title to land will be sufficient for this purpose. Sherwood *v.* Burr, 4 Day's Rep. 244.

If the grantor reserves to himself and his representatives, &c., a servitude or right of passage through the lands conveyed, *non user*, for twenty years, of such right or servitude, will entitle the grantee, or his representatives, to prescribe against it. Powers *v.* Foucher, 12 Mart. Rep. 70.

Twenty years' adverse possession of a diverted water course are indispensably necessary to defeat the proprietor of the ancient channel, and to repel his reclaimation of his right. Campbell *v.* Smith, 3 Halstead's Rep. 139. Smith *v.* Smith, Ib. 141, S. P. Coalter *v.* Hunter, 4 Rand. Rep. 64.

And if the use of the water "was originally applied for as a loan;" granted without consideration as a loan: and its subsequent enjoyment never claimed otherwise than as a loan; more than twenty years' possession will not be adverse." Coalter *v.* Hunter, 4 Rand. 64.

More than twenty years' adverse possession and exclusive use of the lands over which a party claims a right of way, cannot be a bar to an action by him for obstructing such right of way. Wright *v.* Freeman, (on appeal,) 5 Harr. & Johns. Rep. 468.

In the case of Davis' Lessee *v.* Davis' Heirs, 2 Harr. & Johns. Rep. 295, 299, where the question was whether a person under whom the plaintiff claimed title, died seised of the land for which the ejectment was brought, CHASE, Ch. J., said: "the facts and circumstances disclosed in evidence are not sufficient for the jury to presume a title in the heirs of Parnell, or a deed to Parnell, against the defendant, with sixty years' possession. The entries on the rent roll should show a correspondent title. The strongest presumption in this case of a good title, is in favor of the defendant.

"The court are of opinion, that the facts stated by the plaintiff, although the jury should find them to be true, are not sufficient and legal evidence to warrant the jury in finding that Daniel Payne and Mary Payne were seised of the lands, and died seised thereof, in opposition to the facts stated by the defendant if the jury should find them to be true."

"The mere possession of land without any claim of right gives no title, however long it may continue; and the true owner may lawfully enter upon such occupier at any distance of time, because he does no wrong to the occupant, who claims no right. It is the claim of title that makes the possession of the holder of the land adverse to all others." La Framboise *v.* Jackson ex dem. Smith et al., 8 Cow. Rep. 603. (Per JONES, Ch.)

Adverse possession cannot be sustained against the state, unless the state has expressly restricted its own rights by statute.

In the case of Hall *v.* Gitting's Lessee, 2 Harr. & Johns. Rep. 112, 114, CHASE, Ch. J., (with whom the other judges, DUVAL & DONE, concurred) said: "The court are of opinion that there is no adversary possession on the part of the defendant which can defeat the right derived from the state. Under the act of October, 1780, ch. 49, the state became actually possessed of the land; and the act dispenses with the requisites necessary in the case of the crown to avoid a possession adversary to the rights of the crown, to wit, an office found or an actual entry. By an office found in England, the crown becomes actually seised and possessed of any escheat land in question. The state then had the right to pass the act of assembly; and by that act, the state by its commissioners was in as full possession of the land as if there had been an office found, or actual entry by the commissioners, and ouster of the defendant or those under whom he claims."

In the case of La Framboise *v.* Jackson ex dem. Smith et al., 8 Cow. Rep. 602, 603, JONES, Ch. said: "If the title was in the people at the time, the possession of La Framboise, the purchaser, under the assumed ownership of Mackay, would not operate as a bar, unless after an actual possession of forty years; but as against all individual owners, twenty years would preclude the remedy by ejectment. An adverse possession will not obstruct the operation of a patent; and an occupier of land under an invalid claim of title, must have a continued possession for forty years to bar the people or their grantee from the recovery of the same by suit. But where an entry has been made on land vested in the people, by a private citizen claiming it as his own, and he is suffered to hold the premises for the space of forty years, the person so entering and so holding, will acquire the right freely to hold and enjoy the same against the people and their grantees. If, then, the people, after such entry by a citizen, grant the land within the forty years by letters patent to another, the title of their grantee will prevail against the adverse possession of the occupier, if he asserts his right and evicts the intruder within the time allowed by law for his entry. But the grantee of the people in common with all other individuals, must perfect this title by entry upon the settler, within twenty years after his title accrues under the patent, or his entry will be barred, and his remedy by ejectment lost."

In the case of Stewart et al. Lessee *v.* Mason, (3 Har. & Johns. Rep. 507, 531,) the court, per CHASE, Ch. J., said: "Until there is a grant for the land there can be no rightful possession against the proprietary, so as to bar him by limitations."

An adverse possession will not invalidate a *devise* by the true owner, while out of possession of the lands so held adversely.

An adverse possession of lands will not prevent the true owner, though out of possession, from devising them. Waring *v.* Jackson ex dem. Eden et al., 2 Peters' Rep. (Sup. Ct. U. S.) 570; May's Heirs *v.* Slaughter, 3 Marsh. Rep. (Ky.) 505, 508.

H. S. devises his estate to his wife in fee, and dies seized, leaving his widow and two sons, him surviving. After his death, the widow and the younger son, by deed of bargain and sale, convey the estate in fee to H., without the privity of the eldest son and heir-at-law of the testator. H. continues in undisturbed possession of the estate for twenty-two years, and dies possessed, bequeathing it to his children. Six years after H. entered into possession, W. S., the eldest son and heir-at-law, of H. S., makes his will, and devises all his real estate to his wife, and his younger brother, in trust for the life of the wife, and then to his children, and dies three years afterwards, without ever disturbing H.'s possession: held, that the trustees might maintain ejectment, to recover the possession of the estate, notwithstanding H.'s quiet enjoyment of twenty-two years. Doe ex dem. Souter et al. *v.* Hull, 2 Dowl. & Ryl. Rep. 69.

A right of entry in land, is devisable, within the statute of wills, 1 R. L. 52, though at the time of the devise, and of the devisor's death, the land be in the adverse possession of another. Jackson ex dem. Eden et al. *v.* Varick et al., 7 Cow. Rep. 238. Affirmed unanimously, Varick et al. *v.* Jackson ex dem. Eden et al., (in error,) 2 Wend. Rep. 166.

In the case last cited, Varick et al. *v.* Jackson, &c., WALWORTH, Ch. who delivered the unanimous opinion of the court, said: "There is no case in the English books, where it has been holden that a mere adverse possession, not amounting to a disseizin, is sufficient to prevent the owner from devising. And in Goodright *v.* Forester, (1 Taunton, 604, 613,) MANSFIELD, C. J., doubts whether even a technical disseizin has that effect at the present day. So far as there is any authority on the subject in our own reports, it is in favor of the right to devise, notwithstanding a mere adverse possession; (Jackson *v.* Rogers, 1 Johns. C. 33;) and such I believe has been the general understanding of the profession in this state. The common opinion as to the effect of a technical or actual disseizin has probably been different.

"The statute against champerty has no application to this subject. That is only in affirmance of the common law. It superadds penalties, but does not alter the legal effect of the sale of a pretended title. The penalties inflicted by that statute are not applicable to the case of a devisor or devisee. Admitting the will to be in the nature of a conveyance, it could only take effect upon the death of the testator, when it would be too late to enforce the penalty against him; and it would be a singular proceeding to attempt to punish the devisee for the act of the devisor. He may refuse to take a conveyance, but I am not aware that

he can prevent the operation of an absolute devise, any more than an heir-at-law can prevent a descent. Besides, such a construction of the statute might frequently cast the property, by descent, upon the person who was wrongfully withholding the possession from the true owner.

"It has frequently been decided that judicial sales and assignments under the insolvent acts, or proceedings in bankruptcy, are not within the operation of that statute; and I can see no reasons why it should be applied to a devise, which are not equally applicable to such sales and assignments. There can be no danger that a man will devise his estate with a view to litigation, which cannot take place till after his death. It is much more reasonable to suppose he would confess a judgment, and suffer the estate to be sold on execution for that purpose."

And it seems that even a disseizin will not prevent a devise by the disseizee, from passing his right and interest in the lands of which he is disseized.

In the case last cited, (2 Wend. Rep. 202,) WALWORTH, Ch., said:— "Whether, under the British statutes since the abolition of military tenures, there is any disseisin which will deprive the owner of property of the power of devising the same is a question which does not arise under the facts of this case. The statute 34 and 35 Hen. 8, c. 5, sec. 4, authorizes any person having a sole estate or interest in fee simple of and in any manors, lands, tenements, rents or other hereditaments in possession, reversion or remainder, to devise the same. And in Goodright *v.* Forester, (8 East's Rep. 567,) Lord Ellenborough appears to have put some stress on the words in possession, reversion or remainder, as words of restriction or limitation. Where the true owner is absolutely divested of his estate, and the same is vested in the disseisor by disseizin in fact, according to the ancient doctrines of the feudal law, especially if the right of entry is taken away so as to reduce the owner's claim to a mere right, it may not be correct to call it *an estate or interest in possession*, in the words of the British statute, although it is still an hereditament and descendible. Our statute of wills provides, "that any person having any estate of inheritance either in severalty, in coparcenary, or in common in any lands, tenements or hereditaments, may, at his own free will and pleasure, give and devise the same." &c. Sess. 36, ch. 23, sec. 1. It is hardly possible, in broader and more explicit terms, to give a general power to dispose of any property, right or interest in real estate by will, whether the same is a vested freehold in possession of the testator or a mere descendible hereditament or interest therein, in respect to which he had only a right of entry, or a mere right of action. But as the legislature, in the late revision, have settled the rule of property as to all future devises, and being satisfied there was no actual disseizin of the estate of Medcef Eden, the younger, proved on the trial, I think it is unnecessary for me to express any opinion as to the power of a disseizee to devise, either under the British statute of wills or our own."

And although it be a *disseizin* in *fact*, as distinguished from a *disseizin* by *ejection*, yet the devise by the *disseizee* will be equally effectual.

The Revised Statutes of New York, part 2, chap. 6, tit. 1, secs. 1 and 2, vol. 2, pp. 56 and 57, enact as follows:

"§ 1. All persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate, by a last will and testament, duly executed according to the provisions of this title.

"§ 2. Every estate and interest in real property descendible to heirs, may be so devized."

In the case of Varick et al. *v.* Jackson ex dem. Eden et al., (in error,) 2 Wend. Rep. 166, it was decided:

1st. There can be no disseizin in fact, except by the wrongful entry of a person claiming the freehold, and an *actual* ouster or expulsion of the true owner, or by some act tantamount thereto; such as a common law conveyance, with livery of seizin, by a person actually seized of an estate of freehold in the premises, or some one, lawfully in possession, representing the freeholder, or by a common recovery, in which there is a judgment for the freehold, and an actual delivery of seizin by the execution, or by levying a fine, which is an acknowledgment of a feoffment of record."

2d. That "the holding over of a tenant for life, after the determination of his estate, though he claims the fee, is not a disseizin of the rightful owner."

3d. That "conveyances, which are not common law conveyances, accompanied with livery of seizin, divest no rights but those of the grantors."

Where a tenant for life conveys "all his right, title, and interest" in the land to the grantee and his heirs, with a covenant that he is seized in fee, only the life estate passes, for the covenant cannot enlarge the words of the grant so as to pass a fee by *disseizin*. Hurd *v.* Cushing et al., 7 Picker. Rep. 169.

The statute 32 Hen. 8, c. 33, giving a right of entry upon the heir of a disseizor within five years from the disseizin, has been adopted in this commonwealth. [Massachusetts.] Emmerson *v.* Thompson et al., 2 Picker. Rep. 473.

Nor will an *adverse possession*, or a *disseizin*, prevent the right and interest of the true owner, if a debtor from passing by judicial sales; or in the case of an insolvent, by assignment; or, or, as a bankrupt, or an absconding or absent debtor, by legal proceedings pursued in such cases.

It has frequently been decided that the judicial sales and assignments under the insolvent acts, or proceedings in bankruptcy, are not within the operation of that statute." Act to prevent and punish Champerty

and Maintenance, 1 R. L. 172; Varick et al. *v.* Jackson ex dem. Eden et al., (in error,) 2 Wend. Rep. 204; Per WALWORTH, Ch.

The right of an absconding and absent debtor to real estate held adversely, passed to and became vested in the trustees by an act of the legislature of New York, passed April 4, 1786, entitled "An act for relief against absconding and absent debtors." Inglis *v.* The Trustees of Sailors Snug Harbor, 3 Peters' Rep. (Sup. Court, U. S.) 99, 131, 132.

An adverse possession cannot avail the occupant, where the true owner is under any of the disabilities which are protected by the statute of limitations.

The statute of limitations cannot be set up in bar to a recovery against the grandchildren of a person dying seised, against whom there was no adverse possession, where at the decease of the grandfather, the mother of the lessors, through whom the estate descended to them, was under coverture, against whom the statute had not begun to run, and action is brought within ten years after the decease of their father the tenant by the curtesy. Moore *v.* Jackson ex dem. Erwin et al., (in error,) 4 Wen. Rep. 59.

And, an adverse possession commenced during the existence of a *particular estate*, cannot prejudice the right of a person entitled in reversion or remainder, until after the termination of such *particular estate.*

Whether, or not, a possession is adverse, is to be determined by the jury and not by the court.

The question of adverse possession ought to be left to the jury. Jackson ex dem. Jadwin *v.* Joy, 9 Johns. Rep. 112; Jackson ex dem. Beekman *v.* Stephens, 13 Johns. Rep. 496; Gayetty *v.* Bethune, 14 Mass. Rep. 55; Jackson ex dem. Sparkman *v.* Porter, 1 Paine's Rep. 466; M'Clung *v.* Ross, 5 Wheat. Rep. 124; Cummings *v.* Wyman, 10 Mass. Rep. 468.

Whether a possession were or were not adverse is a question of fact, and must be determined by the jury. Atherton *v.* Johnson, 1 New Hamp. Rep. R. & W. 34.

And the judge having directed the jury as to the fact, a new trial was granted. Jackson ex dem. Jadwin *v.* Joy, 9 Johns. Rep. 102; *et vide*, Runcorn *v.* Doe, ex dem. Cooper, (in error,) 5 Barn. & Cress. Rep. 696.

Whether there was a possession of land adverse to the grantor at the time it was conveyed, so as to render the deed thereof void under the

statute of 1806, [of Vermont] is a question of fact to be submitted to the jury; and is not to be determined by the court as an interlocutory question. Stephens *v.* Dewing, 2 Aiken's Rep. 112.

In the case of Pray *v.* Pierce, 7 Mass. Rep. 383, the court *held*, That a trespass on the land of another will not amount to an ouster without a knowledge thereof by the owner, either express or implied; and they said: "But whatever may be the evidence of this notice, it is a fact to be found by the jury, and the court cannot presume it."

"The court were also of opinion, that with what intention, by what right, a person entered into land and possessed it, and to what extent, were facts proper for the consideration and determination of the jury." Helm's Lessee *v.* Howard, 2 Harr. & M'Hen. Rep. 76.

In the case of Seymour *v.* De Lancey et al., 1 Hopk. Rep. 449, SANFORD, Chancellor, said; "If William Seymour acquired a title by adverse possession such a title would preclude all other inquiries; and the inquiry whether his possession was adverse or not, and the length of such a possession, are questions of fact. The inquiry whether the deed from Henry E. Luterloh, is genuine or not, is purely a question of fact. These questions are peculiarly proper for the trial by jury as the best method of ascertaining their truth."

If a plea of prescription be received at the trial, the party pleading it must be permitted to submit the fact of his possession to the jury. Porter *v.* Dugat, 9 Martin's Rep. 92.

The statute of limitations does not, in terms, apply to chancery cases, but the chancery courts will never interfere when by lapse of time, the law judge would not hold jurisdiction. Frame *v.* Kenny's Heirs and Exrs., 2 Marsh. Rep. (Ky.) 145: Elmendorf *v.* Taylor et al., 10 Wheat. Rep 152; Marquis of Cholmondeley *v.* Lord Clinton, 2 Jac. & Walk. Rep. 192; *et vide*, Wallace et al. *v.* Duffield et ux., 2 Serg. & R. Rep. 521; M'Dowell *v.* Heath's Exrs., 3 Marsh. Rep. (Ky.) 123; Hamilton, Ex'x. *v.* Sheppard, Admr., &c., 3 Murph. Rep. 115; Van Rhyn *v.* Vincent's Exrs., 1 M'Cord's Ch. Rep. 314.

Twenty years' adverse possession under a legal title is a bar to a bill in equity, as well as to an ejectment. Hinton *v.* Fox, 3 Littell's Rep. 372; *et vide* Demerest et ux. *v.* Wynkoop et al., 3 Johns. Ch. Rep. 129; Reed & Glen *v.* Bullock et al., Littell's Selected Cases, 512; Shepherd's Heirs *v.* Young, 1 Monr. Rep. 205. *Et vide References, ut supra.*

"It is well settled both in Kentucky and in this court, (Sup. Court, U. S.) that a possession which will bar an ejectment, is also a bar in equity." Hunt *v.* Wickliffe, 2 Peters' Rep. (Sup. Court. U. S. 212.)

It must be twenty years' adverse possession of the land in contest. Spurr et al. *v.* Trimble et al., 1 Marsh. Rep. (Ky.) 281.

A mortgagor cannot redeem after a lapse of twenty years, after forfeiture and possession by the mortgagee, (which period has been adopted in equity by analogy to the statute of limitations,) no interest having been paid in the mean time, and no circumstances appearing to account for neglect. Hughes et al. *v.* Edwards et ux., 9 Wheat. Rep. 489.

Fifteen years' possession, where no statute disabilities, or special circumstances equivalent thereto exist, will bar an equity of redemption. Skinner *v.* Smith, 1 Day's Rep. 124.

Satisfaction of a mortgage is to be presumed after twenty years' possession by the mortgagor, without payment of interest, demand or acknowledgment. Christopher *v.* Sparke, 2 Jac. & Walk. Rep. 223.

"A lapse of less than twenty years from the accrual of the right of suit, is no bar to the assertion of an equitable right in a court of chancery, as it would not be to the assertion of a legal right in a court of law." Fraily *v.* Longford et al., 1 Marsh. Rep. (Ky.) 364.

Twenty years at least are required to bar the equity of redemption in cases of mortgages of a legal or equitable interest in real estate. Slee *v.* The Manhattan Company, 1 Paige's Ch. Rep. 80.

"We do not suppose that the statutes of limitations in terms applies to the case, but it is no less obligatory upon a court of equity than upon a court of law, and it is so considered as the rule of decision in relation as well to equitable as legal rights. In reference to the latter, a court of equity decides in obedience to the statute, and in reference to the former, it conforms to the statute by acting upon its principles according the rule *equitas sequitur legem*." Per BOYLE, Ch. J., delivering the opinion of the court. Lyle et al., *v.* Rowton, 1 Marsh. Rep. (Ky.) 519.

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Aug. 25 1883

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Aug. 22. 1889.